TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 190[redacted]

No. [redacted]18.

VIRGINIA-CAROLINA CHEMICAL COMPANY, PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 9, 1907.

(20,880.)

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1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1907, Fourth Circuit, Darlington County.

Hon. J. C. Klugh, Circuit Judge.

J. P. KIRVEN, Plaintiff-Respondent.
against
VIRGINIA-CAROLINA CHEMICAL COMPANY, Defendant-Appellant.

E. O. Woods, Geo. W. Brown, Stevenson & Matheson, Plaintiff-Respondent's Attorneys.
Willcox & Willcox, W. F. Dargan, Dargan & Coggeshall, Defendant-Appellant's Attorneys.

Case with Exceptions.

This action was commenced in the Court of Common Pleas for Darlington County on the 8th day of February, 1904, by service of a summons and complaint. The following is a copy of the complaint (caption omitted):

2 *Complaint for Relief.*

The plaintiff, complaining of the defendant, alleges:

I.

That the defendant, Virginia-Carolina Chemical Company, is a corporation organized and chartered by and under the laws of New Jersey, as plaintiff is informed and believes, and owns property and is carrying on business in the State of South Carolina.

That the plaintiff is a planter and a resident in the County of Darlington, South Carolina.

II.

That on the 17th day of February, 1898, the plaintiff purchased from S. M. McCall a large amount of fertilizers to be used in making a cotton and corn crop on his farms in the County of Darlington, and that plaintiff is informed, and believes, that the said McCall induced the defendant to furnish the said fertilizers and had them forwarded to the plaintiff, and took plaintiff's obligation to pay for the same, which he subsequently transferred and assigned to the defendant, and that the defendant knew at the time of the shipment to this plaintiff of the said fertilizers that they were to be used by the plaintiff in making his crops of cotton and corn, and it assumed at the direction of the said McCall to furnish fertilizers properly manufactured and of proper fertilizing qualities for the plaintiff's use in making his said crops of cotton and corn.

III.

That the said fertilizers, to wit: acid phosphate and dissolved bone, had been manufactured with such gross negligence and want of skill that, *instead of being of advantage to the crops to which they*
3 *were applied*, they destroyed the same in large part, and *were not only worthless to the plaintiff, but*, by destroying his crops, damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of $1,995.

Wherefore, the plaintiff demands judgment against the defendant for $1,995 and costs.

GEO. W. BROWN,
STEVENSON & MATHESON,
WOODS & MACFARLAN,
Plaintiff's Attorneys.

(Verified.)

The following is a copy of the answer (caption omitted):

Answer.

The defendant answering the complaint herein:

I. Admits paragraph I.

II. Denies paragraph II of the complaint, except that it alleges that it sold an amount of fertilizer to plaintiff through its agent, S. M. McCall, and that plaintiff gave his obligation by way of note therefor to S. M. McCall, as such agent, which said note was thereafter assigned, transferred and delivered to plaintiff who, at all times, was, and is now, the beneficial owner and holder thereof.

II-. Denies paragraph III of the complaint.

WILLCOX & WILLCOX,
W. F. DARGAN,
MITCHELL & SMITH,
Defendant's Attorneys.

(Verified.)

Subsequent to the filing of this answer, the defendant served the following notice and affidavit (caption omitted):

4 *Notice.*

To Messrs. Geo. W. Brown, Stevenson & Matheson, and Woods & Macfarlan, Plaintiff's Attorneys:

Please take notice that in the above stated cause, on its call at the opening of the fall term of the Court of Common Pleas for Darlington County, on the affidavit hereto annexed, and on the pleadings in the cause, a motion will be made on behalf of the defendant, Virginia-Carolina Chemical Company, for leave to file a supplemental answer

permitting said defendant to plead *res adjudicata*, which has accrued since the serving of the original answer.

WILLCOX & WILLCOX,
MITCHELL & SMITH,
Defendant's Attorneys.

Affidavit.

STATE OF SOUTH CAROLINA,
Darlington County:

Personally appeared P. A. Willcox, who, being duly sworn, says that he is of the firm of Willcox & Willcox, defendant's attorneys; that since the filing of the complaint herein and the answer, on the 4th day of April, 1905, a final judgment was duly entered up in the Circuit Court of the United States for the District of South Carolina, having been rendered in the cause entitled Virginia-Carolina Chemical Company *vs.* J. P. Kirven, and that the present cause in the Court of Common Pleas for Darlington County, South Carolina, is between the same parties and involves exactly the same issues which were raised, or could properly have been raised, under the scope of the pleadings in the cause in the United States Circuit Court for the District of South Carolina, referred to, and that said judgment in the Circuit Court of the United States for the District of South Carolina, is a final and conclusive adjudication between the parties upon those issues, and has been recovered and entered since the filing and serving of the answer in this cause.

P. A. WILLCOX.

Sworn to before me this 12th day of October, 1905.

W. J. BROWN, [L. S.]
Notary Public.

The defendant was granted leave, by order of court, to file a supplemental answer, and thereafter the following supplemental answer was filed (caption omitted):

Supplemental Answer.

The defendant, Virginia-Carolina Chemical Company, by way of supplemental answer, herein alleges:

That since the filing of the complaint herein and the answer, on the 4th day of April, 1905, a final judgment on the merits was duly entered up in the Circuit Court of the United States for the District of South Carolina, said court being a court of competent jurisdiction, said judgment having been rendered in a cause entitled Virginia-Carolina Chemical Company against J. P. Kirven, and that the present cause in the Court of Common Pleas for Darlington County, South Carolina, is between the same parties and involves exactly the same issues which were raised, or could possibly have been raised, under the scope of the pleadings in the cause in the United States

Circuit Court for the District of South Carolina referred to. That said judgment in the United States Circuit Court for the District of South Carolina was rendered in a suit on promissory note given by J. P. Kirven, the present plaintiff, for the fertilizers sold to the present plaintiff, J. P. Kirven, from the alleged bad quality of which the present action arises. That said judgment in the Circuit
6 Court of the United States for the District of South Carolina is a final and conclusive adjudication between the parties upon the issues sought to be raised in the present action, and has been recovered and entered since the filing and the serving of the answer in this cause. That subsequent to the rendition and the filing of said judgment, a transcript of said judgment has been lawfully issued by the clerk of the Circuit Court of the United States for the District of South Carolina, and, according to the statute providing for same, said transcript has been duly entered in the office of the Clerk of the Court of Common Pleas for Darlington County, State of South Carolina, on the 11th day of October, A. D. 1905. That the judgment in the Circuit Court of the United States, referred to after being rendered, was appealed from by the then defendant, J. P. Kirven, to the Circuit Court of Appeals of the United States for the Fourth Circuit, which said judgment was in all respects duly affirmed by said court.

WILLCOX & WILLCOX,
Defendant's Attorneys.

(Verified.)

Testimony.

The following is a copy of the testimony:

Messrs. E. O. Woods, George W. Brown, and Stevenson & Matheson, for plaintiff.

Messrs. Willcox & Willcox and Dargan & Coggeshall, for the defendant.

Heard at Darlington, S. C., fall term, 1906, before Judge Klugh and a jury.

JAMES M. EARLE testified:

Direct examination:

Q. Where do you live?

A. In Darlington.

Q. How long have you lived here?

A. All my life.

7 Q. What is your profession—you are a practicing physician?

A. Yes, sir.

Q. In 1898, doctor, did you have any occasion to inspect the crop of Mr. J. P. Kirven?

A. Yes, sir.

Q. State how you happened to make that inspection?

A. Mr. R. L. Dargan requested me to go out to Mr. J. P. Kirven's farm. Mr. Dargan represented the Virginia-Carolina Company, and

he requested me to go out and observe the crop of Mr. J. P. Kirven and of Mr. Kirven's neighbors, and to secure specimens of the cotton stalks as found there standing upon Mr. Kirven's field and other fields in the neighborhood. We went together one afternoon about this time of the year and about the year you mention.

Q. Was it the time there was some trouble between Mr. Kirven and the Virginia-Carolina Chemical Company?

A. About that time. It was late in the fall, about this time of the year; leaves were all off of the cotton. There must have been some frost, for the leaves were all off of the cotton. Mr. Dargan and myself got down on the way along the road and looked at several fields of cotton, among which was Mr. Sexton's—one or two Sextons—out there planted on the public road leading to Leavenworth's Bridge, and approaching Mr. Kirven's crop. These fields were in the neighborhood of Mr. Kirven's. We gathered a few stalks along there. I did not know what we were going to find further on, and got a few specimens along there.

Q. What was the condition of the Sextons' cotton, doctor?

A. Poor condition of cotton; like you might find anywhere, poorly fertilized, poorly worked and poor land. As we passed over the Leavenworth road, and on the premises of Kirven, on the left-hand side of it, there was some cotton growing looked pretty and white, on the left side of the road going along the Leavenworth road going northwest from the town here. That cotton looked so well that we did not gather any of it. I do not know whose cotton it was.

8 Q. That was on the left-hand side of the road?

A. Yes, the left-hand side of the public road and after having crossed the Hartsville railroad.

Q. That was on the left-hand side of the road?

A. Yes, and we saw some cotton on the right-hand side quite different in character and appearance. On the right-hand side of the public road, after having crossed the railroad—quite different from that on the left-hand side, side by side, only the public road intervened.

Q. What was the difference?

A. The same difference that characterized the entire field said to have been planted by Mr. Kirven. It showed a very spindling stalk and little or no cotton on it.

Q. What was the character of the stalk as to height?

A. It was tall and slender.

Q. What was its appearance as to bolls?

A. Many of them not grown bolls or less than half-grown—very many.

Q. What about the mature bolls?

A. Only a few.

Q. Where were they?

A. Low down to the ground. The first two or three limbs that put out from the ground—close to the ground.

Q. After the first two or three limbs?

A. All the others were dead or quite blighted.

Q. Was that a large field?

A. Yes, a pretty large field.

Q. About how many acres in the field?

A. I presume that was planted by different parties. I had not arrived at Mr. Kirven's present possessions. I did not know whose crop it was.

Q. That was some of Mr. Josh Kirven's tenants?

A. I do not know whose cotton it was.

Q. That was after you crossed the Hartsville Railroad and on the right-hand side of the road?

A. Yes; we went on down by the old Kirven house and passed on and arrived at Mr. Kirven's.

9 Q. Which Kirven?

A. Mr. J. P. Kirven, and inquired of some one where Mr. Kirven's crop was, and it was pointed out to us. It was a good, large field—150 or 200 acres of cotton, and presented a very uniform appearance and a very striking one; there was such a vast number of bolls on the stalk that did not mature and that never opened. The general average of the entire field would represent such a picture as these stalks here. We pulled up a stalk and the roots were good, the bottom portion of the stalk good and healthy and well bolled, and I did not see any fault with it, and for one or two or three limbs, were good limbs, and where it did have fruit on those good limbs, that cotton opened, and from there that stalk rapidly became smaller, suddenly became smaller about six or seven inches from the ground. Up to that point a good stalk, and suddenly it became smaller and constricted there like it had a band around it and it grew on up very spindling with a large number of bolls on it, and if those bolls had matured, it would have been a very heavy crop. The limbs were quite long and regular enough. We secured a number of specimens and walked out a hundred or two yards out in the field and gathered some more, and there was the same general appearance there; that is, a good set of roots, a big stalk at the bottom and then rapidly diminishing with very spindling limbs after passing the first two or three limbs, and from there the limbs were small and spindling.

Q. Where was the cotton developed?

A. Only at the bottom. It was the rarest exception that there were any open bolls except at the bottom. As we went on through, we noticed the same character of cotton. I never saw any like it before or any like it since. We came to a branch, I do not know its name, about a half mile from Mr. Kirven's house—we were going from Mr. Kirven's house towards the depot of the Hartsville Railroad, where it joins the C. & D. Railroad in a straight line. When

10 we reached that branch and crossed it, the cotton planted on the side with Mr. Kirven's, on the right-hand side of the public road, and having passed the branch and got on the hill, the cotton there showed the same results. I could not tell any difference between that and the cotton on the other side of the branch which I had left. On getting on top of the hill, we came to a decided difference in the growth of the cotton on the right-hand side of the *said*, said to have been Mr. Kirven's cotton. The greater portion of that cotton was poor in quality and like that on the other side of the branch, a good many acres of it. And we went on a little further

and came pretty close of the Hartsville Railroad, and we came to a very pretty field of cotton, without fault or blemish, as pretty cotton as I ever saw; the stalks not too high and bushy, and every boll open to the tip-top to perfection and white as a snowstorm—every boll open and none picked.

Q. What separated that cotton from the blighted cotton?

A. Nothing but land, the roads were opposite each other and in the same field, and identically the same land.

Q. What would you say about its being perfect cotton?

A. As perfect cotton as I ever saw. It looked like it would make a bale to the acre.

Q. Make a picture as to the way the branch ran, and the railroad and the field. (Witness makes a diagram, which he exhibits to the jury.)

The diagram is introduced.

Q. About what was the height of the blighted cotton you went through?

A. It was very tall cotton.

Q. This poor cotton on the other side of the Dovesville road, how high was that?

A. (Witness indicates.)

Q. You were taken out there by the attorney of the Virginia-Carolina Chemical Company?

A. Yes, sir.

Q. Were you asked for a report on that from him?

A. Yes; he asked me to make out a report at once, which I did.

11 Q. Did they ever make any use of that information?

Objected to.

Q. What did the attorney of the Virginia-Carolina Chemical Company say to you when he got your report?

Objected to on the ground that what the attorney could have said could not in any way bind the company.

Q. What steps did he take?

Objected to on the ground that anything said by Mr. Dargan, the attorney, who is now dead, would not be competent testimony; that this is a purely scientific question, and it is not shown that Mr. Dargan was an expert.

The COURT: Did I understand that it was a statement made by Mr. Dargan when this witness made the report to Mr. Dargan?

Mr. STEVENSON: Yes, sir; as a result of the investigation.

The COURT: I think it would depend on whether it was in the scope of Mr. Dargan's authority. If he was acting in the scope of his agency, and made a declaration, that would bind the company; but the question would come up what was the scope of his agency. Was not the whole thing done for the purpose of securing information for Mr. Dargan's principals?

Mr. STEVENSON: The whole thing was done for the purpose of

securing evidence. I suppose for use in the litigation arising between Mr. Kirven and the Virginia-Carolina Chemical people, and he was conducting that litigation.

The COURT: But he was not employed to communicate his opinion.

Mr. STEVENSON: I am asking him for a statement as to whether he would have any use for this witness in this litigation, and he was the attorney that was conducting the litigation, and his statement as to whether he would need him or not and why. The question I propose to ask I will ask this witness, and we will have the issue more clearly defined. (To the witness.)

12 Q. Don't answer until the other side has had time to object. Did Mr. Dargan, when you made your report, tell you whether he wanted you as a witness, or would use you in the case that was then pending or not, and if he told you that he would not, did he tell you why, and, if so, why did he tell you?

Objected to.

The COURT: After all, I think that would be a matter of Mr. Dargan's opinion with reference to the merits of the case, or the probable result of the case. I do not think it would be competent as testimony now to aid this jury in arriving at the issues to be submitted to them. I think the objection should be sustained.

Exception noted.

Q. Were you ever called in these cases—relative to the damage to this cotton in the litigation that insured? Were you ever called as a witness by the Virginia-Carolina Chemical Company subsequent to that investigation in the litigation that took place here about this alleged damage to the crop?

Objected to as irrelevant and incompetent.

Objection sustained.

Exception noted.

J. P. KIRVEN testified:

Direct examination:

Q. Where do you live?
A. I live about fifty miles north of Darlington, near Floyds.
Q. Floyd is a junction of the Hartsville road with the C. & D.?
A. Yes, sir.
Q. How long have you been living there?
A. All my life.
Q. What is your business?
A. Planting, mostly.
Q. What were you doing in '98?
A. Planting.

13 Q. It is admitted in the pleadings here that you bought a large amount of fertilizers from Mr. McCall and that they were furnished by the Virginia-Carolina Chemical Company in the year 1898, is that correct?

A. Yes, sir.

Q. How much did you buy?

A. Something like seventy tons of acid and some dissolved bone, and thirty-five or forty tons of national special tobacco fertilizer and kainit.

Q. The acid you mean was acid phosphate?

A. Yes, sir.

Q. Where were these fertilizers delivered?

A. Part of them were delivered at Dovesville and part of them were delivered at Floyd, and I think some of them probably were delivered at Auburn and some delivered at Mont Clair.

Q. The fertilizers delivered at Mont Clair, what was done with them?

A. I delivered one car of that fertilizer to Mr. A. A. Gandy.

Q. Did you sell those fertilizers to him?

A. We traded. He had more soda than he wanted, and I swapped him acid for soda.

Q. Did you let anybody else have fertilizer?

A. Yes, sir.

Q. Who?

A. Mr. Jim Summer, half a carload.

Q. Was that Mr. J. T. Summer?

A. Yes, sir; a neighbor of mine.

Q. Who else?

A. I let Mr. Sam Marco have some.

Q. Where was that to be used?

A. He let Mr. Gainey have it—one of his tenants—who lived about four or five miles from my place.

Q. Who else?

A. I let a lot of my lienors and a lot of my people, whom I was supplying, have it promiscuously—I mean in the neighborhood of my surroundings—three or four and five miles around, and sometimes as far as ten miles.

Q. Mr. Tom Garrison, did you let him have any?

A. Yes; he was one of my lienors at the time.

Q. What did you do with what you kept?

A. I used it on my own crop.

14 Q. That was used on your cotton—where did you plant cotton?

A. I planted it here (indicating on diagram made by Mr. Earle).

Q. How much did you cultivate?

A. I cultivated in the neighborhood of 300 acres in cotton.

Q. Three hundred altogether?

A. Yes, sir.

Q. Yours?

A. Yes, sir.

Q. That constituted your individual crop and your share crops?

A. Probably a few share crops in there. There was something more than that planted on the place, including all the share crops and renters, but my own individual crop consisted of about 300 acres in cotton in round figures.

Q. Where was that cotton planted?

A. That cotton was planted in front of where I live, a field of about 150 or 175 acres; and then I planted across the branch a big field.

Q. Do you mean across the branch that runs between you and the railroad?

A. Yes; that that Dr. Earle spoke of.

Q. Where else?

A. Then I planted that piece across the branch, it was a considerable size field, I reckon about fifty or sixty acres.

Q. Where?

A. Across the branch near the railroad.

Q. Tell us where you used these fertilizers, you yourself used?

A. I used them on my crops of cotton, with the exception of about thirty or forty acres.

Q. Mr. Kirven, the cotton you planted on your own place, what experience did you have with it?

A. Well, it grew to be fine; as large a weed as usual, but only a little of it opened at the bottom, a few bolls, the balance all blighted up the stalk.

Q. Was there any of your cotton that did not do that way?

A. Yes; about forty acres.

Q. Where was that?

A. Down on the railroad, just as Dr. Earle has explained it. When my fertilizers gave out that I bought from the Vir-
15 ginia-Carolina Chemical Company, my acid gave out, and I came down here (indicating on diagram).

Q. That was about what time in your planting?

A. When I was preparing my land.

Q. How did it happen that your acid gave out?

A. After supplying my tenants and lienors, I did not have quite enough, and I came down to Mr. Coggeshall to get some more, and could not get out about two tons. I supplied one of my tenants with that, and finished out that field with kainit and cotton seed meal. It was as perfect cotton as you ever saw in your life.

Q. Is that the cotton Dr. Earle was talking about this morning?

A. Yes, sir.

Q. In the field between the branch and the railroad?

A. Yes, sir.

Q. What do you say about this (exhibiting stalk of cotton)?

A. This is a stalk they pulled up. This stalk is eight years old. This stalk of cotton grew in a field that made 2,000 pounds of seed cotton to the acre, and perfect to the very top as you see. It bore a great deal of cotton from the top.

Q. What is this (exhibiting a bunch of cotton stalks)?

A. This is the condition of the cotton where I put the acid that I got from the Virginia-Carolina Chemical Company. I had over 200 acres in this condition. It made about 300 pounds of seed cotton to the acre, and all that opened on that cotton is right at the bottom, a few bolls and all the *right* is blighted.

Q. What separated the cotton of that kind and this kind (indicating the different bundles of cotton stalks)?

A. Nothing, except where the guano gave out; all bedded up exactly alike and planted, only the guano, when it gave out, they used the kainit and meal, and right where it commenced it was a smaller weed, if anything, than the other. This cotton grew in spots. It was not regular. Somehow or other wherever there
16 was a gap where this cotton grew (indicating a certain bundle), if anything, the stalk was smaller, and many a stalk of it had not a boll opened or matured where there was a gap. Where this cotton grew (indicating another bundles of stalks), wherever you found a gap it was a finer stalk than the surrounding stalks, and nothing in the world separated this cotton from this cotton. Mr. Sumner bought a carload of that fertilizer from me, and I went over and looked at it. I found Mr. Sumner's crop pretty much in the same condition as mine. I don't think it was quite as bad as mine, and the only thing I attributed that to was that he didn't use quite as much to the acre as I did. That was the only thing I can attribute that his was not quite as bad as mine.

Defendant objects to witness stating to what he attributed a difference between his and Mr. Sumner's crop, it being merely an opinion of witness, and it not being shown that conditions were the same on the two places.

Q. How far was Mr. Sumner living from you?
A. Just about two miles, and Black Creek was between us.
Q. You sold some to Mr. A. Gandy; did you see his crop?
A. No, sir.
Q. Did you see Mr. Garrison's crop?
A. Yes, I saw his crop and it was blighted and in the same condition. He was a lienor.
Q. When did you first notice anything peculiar about the cotton?
A. Mr. Newt Gandy called my attention to it; that was in August.
Q. What did you see?
A. Mr. Newt Gandy came up there and directed my attention to the cotton, and I noticed the cotton and it was pale and looking badly, yet I found stalks full of fruit. Later on Mr. Garrison came up, some where about the last of August or the first September, and brought some stalks—he brought those stalks and those stalks had commenced decaying, the bolls turning black. Then I
17 went to my field and found the same condition existing in my field that I found with those stalks. Then I heard another complaint from Mr. Gainey. He asked me to go and see his cotton. I went and saw his cotton, and found his cotton in the same condition.
Q. Was Mr. Gainey on Mr. Marco's place?
A. Yes; that was about four miles from my place. Mr. Marco had got some fertilizer from me for Mr. Gainey. I heard complaints coming from everywhere, from my lienors, that their cotton was in the same condition. I went and looked after them, and every field I went to where my lienor cultivated and I had a lien on the crop and I let him have the fertilizer, he was ruined. The surrounding tenants, renters on the same plantation, furnished by different fertilizers,

were perfect. I found that condition with Mr. Garrison, but I found that Mr. Garrison had left ten rows across the center of his field, and I called his attention to it and he told me—anyway, those ten rows were perfect on either side of the road, and I went on——

Q. What was the comparative height of the cotton of those ten rows and the others?

A. Pretty much the same thing; in fact, I didn't notice any difference anyway. I went further on until I struck an adjoining neighbor, Mr. Carraway. There I found Mr. Carraway's cotton perfect, right to the row. Nothing but a row coming up to the line where the plantations were together, and Mr. Garrison's killed. I found my tenants' spotted about all over different parts of the county on different plantations, the same way, my tenants' killed, my renters' killed, other adjoining coming up perfect. That opened my eyes. Mr. Gandy having got acid and Mr. Sumner having got acid caused me to know what killed the cotton.

Defendant objects to witness expressing his opinion as to what affected the cotton.

18 Q. Where the acid was used what was the result?

A. It was just like this (indicating the bundle of cotton stalks).

Q. Where it was not used, what was the condition of the cotton?

A. Where it was not used it was perfect.

Q. On lands right by the side of your brothers and others where they did not use the acid?

A. Some of my brothers got my acid through an exchange, and they had the same in their field and some perfect. My sister had a piece of land and I had it cultivated for her. I was to cultivate it on shares, and I used this fertilizer on it and I did not make enough to pay her anything at all; so I just gave her the rent—just paid the rent for the land.

Q. The crop that you planted, I believe you said you used it on about 150 or 200 acres——

A. Between 200 and 300 acres of cotton.

Q. That crop that you used it on, about how much cotton did you make per acre?

A. I did not make over 300 pounds.

Defendant objects to witness stating how much it made per acre, on the ground that other conditions might have prevailed. He can describe the condition of his cotton, but a good many reasons might have caused a small yield.

The COURT: It seems to me it is competent for the witness to make comparisons of that kind, not only of the appearance, but the results in both instances, in order that the jury might arrive at some conclusion.

Exception noted.

Q. How much did that blighted cotton of yours make per acre?

A. About 300 pounds.

Q. Was there any difference in the character of the land where you put the kainit and meal and where you put the other stuff?

A. None in the world, just a row between them. This was high, well-drained land, and naturally very fine land.

19 Q. How was the season that year?

A. We had a good season.

Q. What do you mean by good season?

A. Not too wet or too dry—just what I call good season. People around me made extra fine cotton; and this cotton where I put the kainit and meal was extra fine, it made at least 2,000 pounds to the acre.

Q. What is the rental value of that land that you cultivated, where you used that acid on, per acre?

A. It is cheap at $10 per acre, land that I have made two bales of cotton to the acre.

Q. You would hold it at $10 per acre rent?

A. Yes, sir.

Q. What was it worth to plant and plow and hoe that cotton crop?

A. It is hard to say exactly, but I do not think that any one could possibly do it for less than $5 per acre.

Q. About what was the fertilizer bill per acre?

A. I put about $10 worth of fertilizer per acre—at least $10 worth.

Q. I suppose your services were worth something in looking after it?

A. I consider my services about as valuable as anybody else on a farm.

Q. About how many acres of that character of land that you say is worth in the neighborhood of $10 an acre rent?

A. I suppose at least 200 acres would be worth that, that I put that fertilizer on.

Q. About how much per year would you say your services were worth in looking over your farm?

A. I would hate to take a thousand dollars per year.

Q. Seeding and planting, what would be the cost of that?

A. That would be at least a dollar per acre; and mixing the fertilizer and hauling the fertilizer is worth a dollar more——I would say 50 cents anyway.

Q. The fertilizer that you got from Mr. Coggeshall, did

20 you have any trouble with them?

A. No, sir; I did not use any of them myself, I let a tenant have them.

Q. What was the condition of his crop where they were used?

A. It was not killed.

Q. You had no complaint on that score?

A. No, sir; not killed like this. He carried me over to look at it.

Cross-examination:

Q. How many bales did you make that year?

A. I suppose I made about seventy or eighty or ninety bales of my own crop.

Q. Of your own crop?

A. Yes; of course, I had tenants and lienors which I controlled, a great many more than that.

Q. What did you do with that cotton?

Objected to as irrelevant. Objection overruled. Exception noted.

Q. What did you do with that cotton?
A. Which cotton?
Q. The cotton that you made?
A. The ninety bales?
Q. Yes.
A. It is a hard question for me to answer what I did with it all; I can't answer it.
Q. How did you dispose of it?
A. I sold some of it at different places and in different ways.
Q. Did you sell any of it to your Brother Hugh?
A. Yes, he handled some of it.
Q. How much?
A. I do not know how much it was now.
Q. One hundred bales?
A. Not of that, just a few bales of that; it might have been mixed in the lot.
Q. That cotton that you raised on that place, and you got from your tenants, did you sell your Brother Hugh as much as 100 bales.

Objected to on the ground that it is irrelevant.
Objection overruled. Exception noted.

Q. Of the cotton you raised on your own place, and that *that* you raised from your tenants, did you sell to your Brother Hugh
21 that year as much as 100 bales?
A. Well, yes; he handled 100 bales for me.
Q. Did you sell it to him?
A. I let him have it to sell. I think I ought to explain the whole thing if you will let me tell the whole thing and not a part of it.
Q. Did you sell it to your Brother Hugh?
A. Yes, he sold it to make a bond for me in this same fight? I turned it over to him to make my bond.
Q. That was the cotton that was shipped to Wilmington?
A. Yes.
Q. And attached by the Virginia-Carolina Chemical Company?
A. Yes.
Q. In which case you swore that that was not your cotton, but it was cotton that had been yours but sold to Hugh Kirven before the attachment?
A. Yes, that was a true statement.
Q. Had you sold it to him before the attachment?
A. Yes.
Q. Had he paid you for it?
A. No, he had not paid me for it.
Q. Didn't you swear that he had paid you for it?
A. No, sir; he did not pay me for it.
Q. Didn't you swear he did?
A. He turned the check over and we refunded.
Q. Didn't you swear in that case that Hugh did pay you for it?
A. You might consider he paid——

Q. Didn't you so swear that Hugh paid it?

A. I don't remember how that was.

Q. That it was some land transaction?

A. We had a good many transactions along then. I am not clear on that.

Q. The Virginia-Carolina Chemical Company recovered seventy bales of cotton?

A. I think so. I gave up the fight because it was too expensive for me. That is the way you are fighting me. Taking me in
22 the United States Court and other places. You won't fight here fair. Give me a fair fight, that is all that I want.

Q. That was a State Court case?

A. It was in North Carolina. I whipped them every time until I got to where it was too expensive. I never was whipped; I always won; and when it went right on up, it was too expensive for a poor man. I would like to tell the whole of it.

Q. The reason you have lost those cases is just because you quit fighting them?

A. Yes; why I quit fighting—here I have equal ground and I always won here. I did not have equal showing and I lost.

Q. How about the State Court at Wilmington?

A. You never whipped, I just gave it up. It was too expensive for me. I never was whipped; I won every time.

Q. How about the last time?

A. I would have got a new trial.

Q. You lost?

A. I gave it up; the only time I lost. I got three falls out of four.

Q. You lost?

A. I saw that I was fighting against something that it was no use to fight further. You could get a new trial in North Carolina no matter what it was, you could get a new trial every time. You had too much money. I could beat you, but I could not hold you. I would have had no fears if you had tried here among my people; fight me here and see how it comes out; give me a fair show, that is all that I want, and I have got the best people in this town to my back, right here to testify for me. What do you run off for and go to the United States Court for? I think I have got a chance when you meet me this way. What do you go to the United States Court for? That is what you do. I do not want anything but what is right, and you would not see these good men backing me up; they are the best people in this country, and every neighbor that I have got as good as can be. Your own men, every one, admit that
23 I was damaged just like that, and you are the very man that said we admit that you were damaged like that.

Q. Did you swear in that case in Wilmington?

A. I did.

Q. Did you swear that the cotton you shipped to Wilmington was sold to your brother Hugh in settlement of a land transaction prior to this seizure?

A. We had a settlement, my brother and myself, and that was a part of it. I sold him cotton, and Major McKay bore me out in

the statement. He was the one that bought it from Hugh Kirven, and I sold it to Hugh Kirven.

Q. Do you know a case tried last term of court, or the court before last, "J. P. Kirven *vs.* J. N. Kirven?"

A. Yes.

Q. Do you remember it was brought out in that case about the cotton in Wilmington, and did you not testify in that case that the cotton that was shipped to Wilmington was a fixed up scheme?

A. No.

Q. And that you owned the cotton all the time, and it never was Hugh's, or words to that effect?

A. No; I said then that in our settlement that that cotton belonged to Hugh and I let him have it to make my bond, and he was to do it, and that was what he was going to do, but my lawyers advised me later not to make a bond. When that cotton was seized by the Virginia-Carolina Chemical people in Wilmington, I had the money deposited to my credit at the Bank of Wilmington, or the Peoples Bank, I believe it was, in the name of Captain Woodham. But in order to be fair to Sprunt & Son, and to show I was fair in my transactions and did not want anything wrong, I withdrew the check and gave the money back and said, "No, I will fight it on its merits, I do not want to take any advantage of Sprunt & Son," because it was levied on as Sprunt & Son's cotton, and they were trying to levy on it under a lien, to show I wanted to make a fair fight, and did not want my friends to suffer. That is what I did.

Q. You did testify in that last case here that after all it
24 was not Hugh's cotton that you testified to in Wilmington?

A. It was only his cotton to use.

Q. Did you not testify that it was only his cotton for temporary use to get it out of your name?

A. I did not say that.

Q. Was not that the effect of your testimony?

A. No, sir; I do not know, you might have construed it that way.

Mr. Woops: We respectfully submit that this is not relevant matter to any issue here, and we think it is time to stop multiplying these issues that are entirely out of this case and consuming the time of this court.

Q. How much did you say your land was worth—rent?

A. Ten dollars per acre. Those fine lands of mine.

Q. Where did that good stalk of cotton come from?

A. Came from across the branch next to the Hartsville Railroad.

Q. Where did the other come from?

A. Next to my house.

Q. How old is that smaller bundle of cotton stalks?

A. The same age as the other, eight years.

Q. When did the cotton begin to blight?

A. I did not notice it until my attention was called to it.

Q. When?

A. I do not know exactly; somewhere about the first of September I began to notice it, or a little later, on account of these signs in

the leaves being specked and being sickly; the cotton of an unusually sickly appearance, not a healthy condition; and when my attention was called to it the bolls, some of them large, green, fine bolls, and just take a knife and slip it through it that way, and it was right rotten inside.

Q. When did it begin to blight?

A. I could not tell you exactly. I think it was somewhere about then.

Q. You did have good, big, green bolls on that cotton?

A. Yes, near the bottom, where it commenced rottening, we had some good big bolls.

25 Q. Your cotton had good, nice, fine roots?

A. Yes, tremendous roots.

Q. And had a good, fine stalk?

A. No, sir; that stalk is not a perfect stalk.

Q. They had this (indicating cotton stalks)?

A. Yes.

Q. They had those roots (indicating cotton stalks)?

A. Yes.

Q. And they only opened at the bottom?

A. Yes.

Q. This boll here (indicating on cotton stalks) is that the top?

A. No, sir.

Q. Near the top?

A. Yes, near the top.

Q. You gave a note, did you not, for this fertilizer?

A. Yes.

Q. For this fertilizer that we are speaking of now?

A. Yes, sir.

Q. Do you remember the amount of the note?

A. Yes, I think it was something like $2.298.

Q. Dated March 14, 1898?

A. Yes.

Q. Due October 25th after date?

A. I do not remember the date.

Q. The note was signed by J. P. Kirven?

A. Yes.

Q. Payable to S. M. McCall?

A. Yes.

Q. Is not that the same note you were sued on in the United States Court?

Objected to as irrelevant. Objection overruled. Exception noted.

Q. Is that the note the Virginia-Carolina Chemical people sued you on in the United States Court?

A. They were suing me on the claim; they claimed that they lost the note. There was something about a note, they never wanted to produce and never produced that note. There was something that they wanted to get around, and that note was made way with on pur-

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pose, and they never would produce that note, and if you had
26 produced that note you never would have got in the United States Court—that is my opinion.

Q. Is that the note that was sued on in the United States Court?

A. I reckon you were suing on that claim, you did not have the note.

Q. That was the note that was in question in that suit?

A. I do not know, they did not have any note.

Q. Did you not see your name on it?

A. You sued on a lost note.

Q. They sued you on this same fertilizer claim?

A. Yes, on a claim you were claiming a balance of about $900. If you had showed that note up there and got everything straight, you had no right in the United States Court on a $900 claim.

Q. The note you gave McCall for fertilizer is the same fertilizer you are contending about; that is the note that you were sued on in the United States Court; just answer that question?

A. You were suing on some claim you claimed against me, a balance of $900.

Q. On that same fertilizer claim?

A. You were suing on a $900 balance.

Q. On the same fertilizer you are contesting about now? That was what we claimed, was it not?

A. I had a verdict before that and you ran into the United States Court.

Q. We would run there?

A. I did not consider that you had any claim, and do not yet.

Q. But whether we did run to the United States Court, as you contend, that was what we were doing when we got there?

A. I do not know what you were doing hardly; you did pretty much as you pleased; I had no show.

Q. Who represented you?

A. I had good legal talent.

Q. Who were they?

A. Mr. Stevenson and Smythe, of Charleston, and Lee and E. O. Woods and Mr. Brown.

Q. And yet I did as I pleased?

A. Yes, you had your own sweet way.

27 Q. The note which you admitted you signed for the fertilizers, did not the Virginia-Carolina Chemical Company sue you in the United States Court on that note?

A. Yes; they sued me here, too.

Q. They recovered in the United States Court and got a judgment?

Objected to on the grounds that the record is the best evidence.

A. I do not know how it went.

Q. We at least sued you on the note?

A. I do not know whether you did or not; you sued me on some kind of claim; you did not have a note.

Mr. Stevenson: We insist that the contents of the record will show what he was sued on, and this is not the way to prove a record.

Objection overruled. Exception noted.

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Q. This is the note that you describe for $2,298; you have admitted signing such a note; is not that the note that we sued you on?

A. I do not know what you are suing me on. You are suing me on a claim for $900. I do not know anything about it. I left it all pretty much to my lawyers; they can tell you more about it than I can.

Q. Did you not know in the United States Court what we were suing you on?

A. Well, I thought I knew.

Q. What did you think it was?

A. I thought it was a claim for $900 that you were suing us on.

Q. Did you not think it was the same note for fertilizer?

A. You had no note.

Q. Did you not give one?

A. I gave one, but you threw it away or done something with it.

Q. Did we not sue on your note?

A. I do not know what you were suing on, except the $900 account.

Q. Do you mean to say that you did not know that the Virginia-Carolina Chemical people sued you on that note?

28 A. No, sir; you sued on a balance I owed you for $900. Is that what you want?

Q. No, sir.

A. I do not know, then.

Q. When we sued you in the United States Court, did not we sue you for the entire note?

A. I do not think so; my understanding it was the $900 claim.

Q. And did not the balance come by reason of the credit for the cotton in Wilmington that arose after the suit was brought?

A. I do not know how that was.

Q. What were we suing you for in the United States Court?

A. Suing me for the balance of $900.

Q. What for?

A. What you said I owed you.

Q. What for, for this fertilizer?

A. Yes.

Q. We sued you whether the amount is correct or not; we sued you for a claim for that particular fertilizer, did we not? Claiming you owed a particular amount for that fertilizer?

A. Nine hundred dollars.

Q. That was what it was for?

A. You could not have had any other claim that I know of.

Q. It was that claim?

A. It was a claim for $900.

Q. If it could not have been any other claim for anything else, what was it for?

A. It was for the fertilizer.

Q. Was it that fertilizer that you were describing?

A. I do not know; I whipped them out for everything except the cotton; that was all I owed you for was the cotton.

Q. I am asking you what we sued you for in the United States Court?

A. You sued for a balance of $900.

Q. Due for what?

A. For fertilizer.

Q. Which fertilizer?

A. Due for the kainit, I would say.

Q. Bought from whom?

A. From S. M. McCall.

Q. Did we not sue you for all the fertilizer?

A. Which? Did I not get a verdict? Did not the Supreme Court sustain it except the kainit?

Q. What did we sue you for in the United States Court?

A. For $900.

29 Q. What did we say that the amount was due for?

Objected to on the ground that the record is the best evidence, and the records show what the suit was for.

Q. Was not the suit in the United States Court for the fertilizer which you are contending about today?

A. It is for a balance that you claim I owe you.

Mr. WILLCOX addresses the Court: I think, may it please your Honor, I am entitled to an answer to that question. The witness knows whether it was on account of that fertilizer or not, and we submit that he can answer that question yes or no.

The COURT: I understood him to say that the claim was in connection with the fertilizer. I think he has testified more than once during the cross-examination that it was on account of the fertilizer that you were asking him about.

Mr. WILLCOX: If he said that it was for that fertilizer, then it is not necessary for us to pursue the inquiry.

Mr. WOODS: He has said that several times.

Redirect examination:

Q. How many bales of cotton was it that you gave up in Wilmington?

A. I gave up in Wilmington seventy bales of cotton.

Q. There were seventy bales in that lot that was litigated about?

A. Yes.

Q. What cotton was seized by the Virginia-Carolina Chemical Company?

A. They seized thirty bales here—they first seized fifty bales and then they had to turn that loose, and then they seized thirty, sold it here at a little pitiful sum and took the money.

Q. What became of the thirty bales they seized here?

A. They had to pay the money back.

Q. What became of that suit in the State Court

A. They withdrew the suit and went into the United States Court.

30 Defendant objects on the ground that plaintiff's attorney is asking him questions that he objected strenuously to defendant asking, to wit: the contents of the record.

A. I would like to make one statement. This cotton, gentlemen, was pulled up out of my field of cotton, not selecting the worst, but some of the best and some of the worst, out of that 150-acre field.

Q. Do you remember who selected that cotton—what committee did you have?

A. Several men saw that cotton pulled up, and plenty will tell you just like that.

JOHN A. RUSSELL testified:

Direct examination:

Q. Mr. Russell, where do you live?
A. I live at Society Hill.
Q. What is your business?
A. Farming.
Q. How long have you been farming?
A. All my life.
Q. What were you doing in 1898?
A. Farming.
Q. How near to your farm were the lands of Mr. A. A. Gandy?
A. Adjoining plantations; just a road between them.
Q. Did you gin Mr. Gandy's cotton?
A. Yes, sir.
Q. Did you notice anything peculiar about it
A. Well, sir, there was a good deal of rotten cotton in it.
Q. To what extent did you notice that?
A. I think my recollection now is 1,500 pounds of seed cotton made about 450 pounds of lint with the bagging added. I had it weighed at the gin separately from the other cotton.
Q. The rule in cotton that is not rotten, how does it pan out?
A. It about thirds itself; about 500 pounds to 1,500 pounds.
Q. At your place, did you have any trouble of that kind?
A. No, sir.
31. Q. What kind of a season was it?
A. I do not remember. My recollection is that the season was fairly good.
Q. Your cotton was not rotten?
A. No, sir.

T. L. GARRISON testified.

Direct examination:

Q. Where did you live in 1898?
A. In Darlington County, Leavensworth Township.
Q. Were you farming
A. Yes, sir.
Q. Whose land?
A. On rented lands.
Q. Do you remember whose land it was?
A. Yes, it was known as the Sexton place, now owned by P. R. Rhodes, about five miles from town.

Q. From whom did you get the fertilizer?

A. I got it from J. P. Kirven.

Q. What kind did you get?

A. I got three tons of acid, two tons of kainit and two tons of meal. I got seven tons, I think.

Q. Tell us how you used it and what was the result?

A. I mixed it together, the acid kainit and meal, all except a little. I had a notion for a little experiment of my own, not expecting any difference in the fertilizer. I left ten rows in the field—about ten rows right in the middle of the field.

Q. What did you put under those ten rows?

A. Meal and kainit mixed.

Q. Did you leave out the acid in those rows?

A. Yes.

Q. The balance of the field, how was it?

A. In the balance of the field I mixed the meal, acid and kainit together, and put them all over the balance of the ten acres and in cultivating it you could not see any difference, all nearly alike, but later on, about gathering time, the last of August or first of September, you could tell a mighty big difference. The ten rows where I had the kainit and meal under were good cotton, well developed, and made a thousand pounds to the acre or 1,200, and the
32 other right by the side of it on each side, row to row, did not produce three hundred pounds to the acre.

Q. Did you call Mr. Kirven's attention to it?

A. Yes.

Q. When you first noticed it?

A. Yes.

Q. He said something about your carrying some stalks down there to show him, where did you get them?

A. Right in the field where these ten rows were, right through the field on both sides of the other cotton. After I prepared the land to plant I concluded that I would try the kainit and meal together without the acid to see what it would do, as well as have some experience how to buy fertilizer afterwards, and I left over ten rows, and the cotton on each side of those ten rows did not make three hundred pounds to the acre and the stalks were fully as large.

Q. What was the reason you did not get any more cotton?

A. The bolls were there all right, there was plenty of fruit on the stalk, but by the time it ought to begin to open at the bottom it would be right black and did not open at all.

Q. Did you cut in those bolls?

A. Yes, I searched them for insects and all such.

Q. Did you find anything?

A. Never did find anything but rotten cotten there.

Q. Did you call the attention of any of your neighbors to it?

A. Yes.

Q. Did any of them examine it?

A. Yes.

Q. Tell us some of the people that examined it?

A. Mr. W. S. Hatchell, for one. He came to my house and I and

him were walking through this ten-acre cut and I did not tell him of any trouble at all, any difference in the cotton at all; I and him were walking across looking at the damaged cotton, and when we struck those ten rows he said to me——

Q. Did he notice it?

A. He said "those rows are a big difference, quite a big difference in this cotton," he said; "what is the cause of it," he said. I then explained to him the difference in the fertilizer being put
33 down there in the spring. And another gentleman, Mr. D. C. Reynolds, came to my house, and Mr. George Carraway also was farming right by the side of me, and our rows were running the same way and about the width of one row between us. We were good friends and did not leave a very big hedge-row between us, and his cotton was as good cotton as I ever saw according to the quality of the land. My weed was somewhat larger than his, and I do not know how much he got to the acre, 700 or 1,000 pounds, and I got 250, I reckon. I did not get but three bales off of eighteen acres of real good weed, up to a man's shoulder.

Q. What kind of season did you have?

A. Splendid season I call it.

Q. How far is that from Kirven?

A. About a mile from Kirven's place.

Cross-examination:

Q. How many acres did you plant?

A. Eighteen acres.

Q. How much dissolved bone under it?

A. Three tons.

Q. How many acres had this under it?

A. All except those ten rows.

Q. How many tons, how much fertilizer did you buy from Mr. Kirven?

A. Three tons of acid.

Q. How much did you pay him for it?

A. I do not remember, about $13.00 or $14.00 per ton.

Q. Do you remember testifying about this fertilizer?

A. Yes, I do not remember what I testified, but I remember testifying.

Q. Did I not ask you this question: "Did Mr. Kirven make you pay for that fertilizer?" and wasn't your answer, "No, sir"?

A. Did not make enough to pay him.

Q. I am asking you if that was not your answer—"No, sir"?

A. I do not remember whether I answered "No, sir," or not about his making me pay for it.

34 Q. Do you deny it?

A. No, I do not deny it or acknowledge it because I do not remember it. If you call my attention to which trial it was, maybe I did answer no, because I did not pay him.

Q. Did I not ask you this question, "Did he make you pay for any of it," and wasn't your answer, "Certainly"?

A. That is correct.

Q. Did I not ask you this question, "This gentleman here is your brother?" and wasn't your answer, "Yes"?

A. Yes.

Q. Did I not ask you this question? "After this cotton was injured, on the public square, did you not tell him"—referring to your brother—"that if Mr. Kirven won those cases, Mr. Kirven was to give you $50.00"? and did you not answer, "No, sir, I did not tell him so"?

A. I do not think I answered it that way.

Q. Do you deny that; do you deny that I asked you that question and that you said "No, sir, I did not tell him so?"

A. If I ever said no, I say no now.

Q. Did I not ask you that question and did you not say "No, sir, I did not tell him so"?

A. I think you tried to make me change my statement. I think that was your idea.

Q. I ask you this, did I not ask you this question, "After this cotton was injured on the public square, did you not tell him—referring to your brother—that if Mr. Kirven won this case, Mr. Kirvin was to give you $50.00"? and did you not say "No, sir, I did not tell him so"?

A. I say no, sir, now.

Q. Did you not answer that way then?

A. Yes sir.

Q. Did I not ask you this question, "Did you tell anybody that?" and did you not say "That does not make any difference"?

A. I reckon I said that.

Q. Did I not ask you this question, "Did you tell anybody that"? and did you not say "I may have told somebody that"?

A. I think that is right.

35 Q. Did I not ask you: "Did you do it?" and did you not say "Probably I did?"

A. Yes.

Q. Did I not ask you this "Did you?" and did you not say "I am not up here to lie?"

A. Yes, I said that, too.

Q. And didn't the Court say "Answer the question?" and did you not say, "Yes, I said so?"

A. Yes, that is right.

Redirect examination:

Q. Were you damaged as much as $50.00?

A. Yes, damaged $200.00.

Q. Were you damaged more than $50.00?

A. Yes, $200.00 would not put me in the shape I would have been in if I had made the crop which I ought to have made according to the weed.

A. A. GANDY, testified:

Direct examination:

Q. Where do you live, Mr. Gandy?
A. In Darlington County, Society Hill Township.
Q. Were you living there in '98?
A. I was farming there. I was living in town here.
Q. Did you run a cotton farm?
A. Yes.
Q. Where did you buy most of your fertilizers that year?
A. I think I bought most of them from Mr. McCullough.
Q. He was representing the Darlington Phosphate Company?
A. Yes.
Q. Did you get any from Mr. Kirven?
A. Yes, I got ten tons from Mr. Kirven.
Q. What kind did you get from Mr. Kirven?
A. Acid.
Q. Did you use those fertilizers on your place?
A. Yes.
Q. What results did you get from the fertilizers that you got from Mr. Kirven?
A. I got pretty poor results from those I used on the cotton. I used it on oats, corn and cotton. I was not there and did not see the fertilizer applied, but my foreman told me where I used that fertilizer——
36 Q. Were you at the farm occasionally?
A. Yes, about once a week.
Q. Where you had these fertilizers applied, did you notice any difference?

Objected to on the ground that the witness did not see the fertilizer applied, but only received certain information from his foreman.

Q. Which fertilizers did you get first?
A. I got the kainit from Mr. Kirven last. I could not get any more from the phosphate's works; they had sold out.
Q. Did you know what land had not been planted when you got the Kirven fertilizer?
A. Yes.
Q. Had you used all your Darlington phosphate fertilizer?
A. Yes, and had to buy some more.
Q. On that land that you planted, after you got Mr. Kirven's fertilizer, what result did you have?
A. I had a heap of rotten cotton on that field.
Q. About how much cotton did you make on that piece?
A. I do not know, I did not make a record of how much I made per acre, but I had a good deal of rotten cotton and made a very short crop.
Q. How about the cotton that was fertilized with the fertilizer that you got here?
A. I had some rotten cotton all over the place, but not near so bad as the field where I used the acid.

Q. Did you notice Mr. Russell's cotton on the adjoining place?
A. Yes.
Q. Did he suffer that way?
A. No sir.
Q. What was dividing you and the plantation that Mr. Russell had?
A. Nothing but just a little ditch.
Q. If the whole crop had been as full as it was where you used the fertilizer that you got from Mr. Kirven, would you have made anything hardly?

Objected to as speculative and the opinion of the witness.

Q. Did you see the crop?
A. Yes.
37 Q. Did you see it from time to time?
A. About once a week.
Q. What did you go to your farm for?
A. To instruct them how to carry it on.
Q. Did you inspect your farm?
A. Yes, went all over it every time I went there.
Q. Did you make any sort of a crop on that part on which you used the Kirven fertilizer?
A. I made a tolerable fair crop: I had a good deal of rotten cotton all through it, but I made a right smart on it.
Q. How did that compare with the balance of your crop?
A. It was a good deal worse than the other part of the crop, but I had some rotten cotton all over the place, and have some all over it this year.
Q. Did you have any experience in putting it under turnips?
A. No sir, I do not think I did.
Q. What result did you get where you put it under grain?
A. I tried some on some rye and I lost the crop of rye. I do not know whether the fertilizer did it or not. Sometimes I lose a crop of rye planted right early in September; sometimes it gets killed from the sun. I have had it killed sometimes when it did not have anything under it. I lost a crop of rye that year, too.

W. S. HATCHELL, testified:

Direct examination:

Q. Mr. Hatchell, where do you live?
A. In Darlington County, three and a half miles from here, north.
Q. Did you go over Mr. T. L. Garrison's cotton field in 1898?
A. Yes.
Q. Who was with you, if you remember?
A. Mr. Garrison was with me.
Q. How did you happen to go through that field?
A. I first went to Mr. Kirven's and rode over his field and went on from there to Mr. Garrison's.
38 Q. What condition did you find Mr. Kirven's crop in?
A. A portion of the crop I found had a very good weed and

was full of fruit, and about three or four bolls at the bottom of it open and the balance of it was on the stalk there rotten.

Q. State whether or not that had the appearance of it over there (pointing to bundle of cotton stalks)?

A. Yes, that is it.

Q. Did you see any other cotton at Mr. Kirven's?

A. Yes.

Q. What was its condition and where was it?

A. He had a piece of cotton right by the side of the Hartsville Railroad that was about as good cotton as you ever see in this country.

Q. Does that resemble it (showing cotton stalk to witness)?

A. Yes, it looked a good deal better than that does.

Q. What separated that from the balance of Mr. Kirven's crop, the bad cotton from the good cotton?

A. He has got a farm that a branch divides. On this side there are 75 or 100 acres. Where the good cotton was it was nothing but a road that divided it, that on this side of the branch, the branch divided the other.

Q. On the other side what was the condition of the cotton?

A. It was rotten like that.

Q. Like this diseased cotton?

A. Yes.

Q. The boll was dead?

A. Yes.

Q. Did you cut any of those bolls?

A. Yes.

Q. What was the condition of them inside?

A. There was nothing inside. You cut clean through like cutting a rotten potato or apple.

Q. What was the appearance of the bolls on the outside?

A. They looked all right to me. I could not see anything wrong with them unless you cut them open—that is, where they had not burst open. Some of them had opened and there was nothing in them.

Q. Just opened and nothing in them?

A. Nothing in them.

39 Q. Where did you go from there?

A. To Mr. Tom Garrison's.

Q. Did you go through his field?

A. Yes.

Q. What did you see there?

A. I found his cotton was in the same fix as Mr. Kirven's; had a very good weed and only three or four bolls of cotton opened and matured at the ground and the balance on there rotten in the same condition as Mr. Kirven's. I think there was about ten acres in the field, and I think about the center of the field there was a streak of ten rows, I think I counted the rows, I will not be positive about that, I think I counted the rows, a streak of good cotton right through the middle.

Q. How did that appear to you, as the kind of cotton you have seen of Kirven's about the railroad?

A. It was not as good cotton, it would not make as much to the acre as Kirven's.

Q. Was the land in a high state of cultivation?

A. No, sir.

Q. What do you say as to its being a healthy, good crop of cotton for the land?

A. I walked down a row and counted a good many stalks where the bolls were matured and open and my judgment is that they would make between 1,000 and 1,200 pounds of seed cotton to the acre.

Q. The other cotton, how much would that make to the acre, the damaged cotton?

A. I do not think it would make more than 300 pounds to the acre.

Q. Did you look at the adjoining farm there of Mr. Carraway?

A. No, I do not think I noticed that.

Q. Did you look at Mr. James T. Sumner's?

A. No, sir.

Q. What would those lands of Mr. Kirven's be worth to rent per acre—that is in the high state of cultivation that you saw that damaged cotton on?

A. I really do not know; I would state that I saw it make about 2,000 pounds of seed cotton to the acre. I see Mr. Kirven's crop nearly every week, it is on the road where I go to church and I always see him have a tolerable good crop.

Q. The usual rent is about one-fourth?

A. Yes, I suppose so.

Q. Two thousand pounds of seed cotton to the acre and one-fourth would be 500 pounds?

A. Yes.

Q. Did you notice any of the other crops adjoining Mr. Kirven's lands there?

A. Yes, on the right-hand side, going up the road to the church, there was stuff planted there. That was very good cotton; I did not see any rotten cotton in that.

Q. What was between that and Mr. Kirven's?

A. Just the road.

Q. What was seed cotton worth at that time?

A. I could not answer what it was worth at that time.

Cross-examination:

Q. What year was that?

A. It has been about eight years ago.

Q. You did not use any of this fertilizer yourself?

A. No, sir.

Q. What kind of a crop did you make in 1898?

A. Made a very good crop, I think.

Q. What fertilizer did you use?

A. I almost always used kainit, acid and meal.

Q. Who did you buy your acid from?
A. I could not say now, I expect that I used some of the Darlington fertilizer.
Q. You do not know who you bought it from that year?
A. No; I could have looked and told.
Q. About how much lint cotton did you make to the acre?
A. I could not answer that.
Q. About how much?
A. I generally average a bale of cotton to over two acres, if it is a good crop year; a bad crop year I do not.
41 Q. What kind of a crop year was that?
A. I do not remember.
Q. Did you make a bale to the acre that year?
A. No, some few acres in my place I made a bale.
Q. You just averaged about a bale to two acres?
A. About so. That is about an average of my farm, some years a little better and some years about that.
Q. You fertilize about the same every year?
A. No, sir; some years I fertilize heavy and some years I do not.
Q. How did you fertilize this year?
A. I used 700 pounds of fertilizer to the acre to my cotton.
Q. What kind of crop did you make this year?
A. Pretty sorry crop.
Q. How much to the acre did you make?
A. I had 75 acres in cotton and I ginned 25 bales. It may be I will make two more.
Q. About a bale to three acres?
A. Yes, and I used 700 pounds of fertilizer to the acre.
Q. Is that a good amount of fertilizer?
A. It is a little heavier than I have been using.
Q. Where did you buy that fertilizer?
A. From Mr. Billy Brunson, that is the acid and kainit.
Q. You fertilized as well as you did in '98?
A. I cannot say how I fertilized in '98.
Q. Did you have much rain this year?
A. We have had the worse crop year that I ever experienced in my life.
Q. Did you have any rotten cotton?
A. No, sir.
Q. Did you have a big weed?
A. No, sir.
Q. Why?
A. Now you ask me a question I cannot answer. Where I used stable manure and 700 pounds of fertilizer the cotton was not that high (indicating 12 inches). I was sick nearly all the year and my crop was not cultivated as it should have been, and taking all into consideration, the wet year and me not being able to see after the crops like I ought, it makes a big difference in my farm.
42 Q. This year you made a bale to three acres?
A. I told you what I made as near as I could.
Q. How far do you live from Mr. Kirven?

A. I suppose it is about two miles and a half, about a mile and a half to where he farms.

Q. Do you know any land in your immediate section that will rent for $10.00 per acre?

A. I do not know that I do. I don't know, but if I was renting land, if he would let me go and pick the land, I would give him $10.00 per acre.

Q. How much?

A. I suppose I could select 100 acres that would rent for $10.00 per acre, and I think I could select 100 acres on his farm that a good crop year I could make a hundred bales of cotton.

Q. That is different from other land?

A. Yes, I think it would be right hard to pick out as big a bulk of land as that up to the state of cultivation that Mr. Kirven's land is.

Q. Mr. Kirven's land renting for $10.00 per acre would be rather remarkable?

A. Yes.

Q. Differing from all other land in that community?

A. That is up to a high state of cultivation.

Q. Therefore it is a different condition of land from the other?

A. Yes sir, it is in a state of cultivation higher than——

Q. Than any other land?

A. I do not know; there is Mr. Jim Sumner that has very good land and some on Mr. Hugh Kirven's place.

Q. Do you know what those lands are returned for taxes for?

A. No, sir.

Q. Are you in the same township?

A. No.

Redirect examination:

Q. The year 1898 was not so bad a year as this?

A. No, sir, this is the worse year that I have ever seen in farming.

Q. Did you notice this damaged cotton where there would be a stalk, with a good deal of difference between it and the other
43 stalk, where the stalk had a plenty of room and a break in the row, or something, did you notice whether that was in the same condition as the other or not?

A. That looked like it did not grow quite as big as where there was a regular stand.

Q. What was its condition as to bolls?

A. Rotten, some of them. I noticed some stalks that did not have none open about the ground; where there was a gap it seemed like it was worse than where it was a regular stand.

Q. Where cotton is very thick and laps over so that the sun cannot get to it, you have seen during a wet season some rotten cotton, but when it has room——

Objected to.

A. Of course, where it has room it would not be as apt to rot. I have always seen some rotten cotton all of my life, but you could not take your knife and cut it in two but what you would find some fibre in there.

Q. How do your lands compare with Mr. Kirven's?

A. Mr. Kirven's lands are a good deal better than mine. I would rather have one of his than two of mine. I can take the fertilizer that I have used and on his land make a bale of cotton to the acre, where on mine I do not make but a half bale.

W. L. FLOWERS, testified:

Direct examination:

Q. Mr. Flowers, what is your occupation?

A. Farming.

Q. Been at it long?

A. That is all I have ever done.

Q. Did you see Mr. Kirven's cotton crop in '98?

A. Yes.

Q. Did you notice anything about it?

A. Yes.

Q. What was it you noticed?

A. I noticed it rotten, decayed.

Q. Describe what you noticed?

A. I noticed it was a high, good, big weed as he generally
44 makes, pretty well fruited, and I noticed that about the bottom of the cotton there were just a few bolls open.

Q. And the balance of it?

A. I went about in the cotton and looked at it and tried to examine it. I thought perhaps it was the boll weevil or something. I had heard of the boll weevil. I examined the cotton the best I knew how and tried to find something the matter with the boll, even those that looked to be matured, but I could not find any specks or anything like that.

Q. Could not find anything the matter with them?

A. No, sir.

Q. When you cut it open what did you find?

A. I do not know what I found; it was a kind of jelly looking stuff. You could cut right through it like you could an apple or something.

Q. Looked like jelly in there?

A. Yes.

Q. Was there much of that on Mr. Kirven's place?

A. Yes, it looked to me like there was a great deal of it.

Q. Did you see the cotton between the branch and the Hartsville Railroad there?

A. Yes.

Q. Did you see any difference between any of that cotton?

A. Yes, sir.

Q. What did you see?

A. I saw some well-matured cotton, well-developed cotton. I thought it was as good cotton as I saw anywhere. And I saw some that was smaller cotton, but about knee high, and that was rotten like Mr. Kirven's was over at his place. I saw that difference in a field when I was over at Mr. Kirven's place examining his cotton. I saw the difference in coming to Darlington here.

Q. You saw it in driving along the road?
A. Yes, sir.
Q. What separated that?
A. Just a row, one row looked like it was very decaying and the other row perfect cotton.
Q. Right side by side in the same field?
A. Yes.

45 Cross-examination:

Q. Across the hedge row?
A. No, sir.
Q. In the same field?
A. Yes, sir.
Q. You did not examine that second field?
A. No, sir, I did not get down and examine it.
Q. You just examined what you thought was bad?
A. I went over his whole field, went over that two or three times to see if I could find what was the matter with it. Farming is my occupation and I wanted to find out.
Q. You did not examine that other field?
A. I did not, I saw it was in the same condition. I did not get out of my buggy to examine it.

Redirect examination:

Q. You could see that from the road?
A. Yes.
Q. Did you notice where there were breaks in the road, where the stand had not been good, did you notice the cotton there?
A. Yes, sir.
Q. What did you see there?
A. I saw even where it had long spaces—as a general thing my experience is where it has got more space the stalk will grow larger and actually fruit better. This did not seem to be any larger and you could not see any cotton open on that hardly.
Q. Did it appear to rot more completely where the stalk was off to itself?
A. Yes, sir.
Q. Did you ever cultivate any of that land?
A. Yes, sir.
Q. What kind of land is it?
A. It is good land.
Q. What would you say it would be worth, the rental value, take it all over?
A. What we call Mr. Kirven's home place in the state of cultivation it is in now, I think it would be worth—I think he could rent it out this evening for $10.00 per acre.

46 Recross-examination:

Q. You live in the same township that Mr. Kirven does?
A. No, sir.
Q. Are you on the Board of Equalization for taxes in your township?

A. No, sir.
Q. Do you know what the average return of the value of land is in Mr. Kirven's township?
A. No, sir, I do not.
Q. Is the land in that township returned for more than $10.00 per acre?
A. I do not know.
Q. How about your land?
A. No, sir, I do not know what my land is valued at.
Q. You do not know what it was returned at for taxes?
A. No, sir. I just know I pay my taxes. I do not seek to find out what the returns are.

Redirect examination:

Q. Did you see anybody else's cotton in the same fix as Mr. Kirven's?
A. Yes, sir.
Q. Whose was that?
A. Mr. J. T. Sumner's. I have a place known as the McIntosh place at Leavenworth, and I have to go by Mr. Sumner's to go from one place to another, and I noticed his cotton was in a pretty bad shape before I knew anything about Mr. Kirven's field. I noticed Mr. Sumner's first and after that I noticed Mr. Kirven's was in the same condition.
Q. Was it you that called Mr. Kirven's attention to it?
A. I called Mr. Sumner's attention to it.
Q. Were they both affected the same way?
A. Yes; I do not think that Mr. Sumner's was quite as bad as Mr. Kirven's.
Q. Is Mr. Sumner alive?
A. No, sir, he is dead.
Q. Did you notice anything of anybody else's land around Mr Sumner's?
A. No, sir.
47 Q. How far does Mr. Sumner live from Mr. Kirven?
A. About two or two and a half miles. He is on one side of Black Creek and Mr. Kirven on the other.

B. H. Carraway, testified:

Direct examination:

Q. Where do you live, Mr. Carraway?
A. In Leavenworth Township.
Q. Were you living there in '98?
A. Yes.
Q. How far was your place from where Mr. T. L. Garrison was farming that year?
A. I suppose a quarter of a mile.
Q. From where your house is?
A. Yes.
Q. Are they adjoining lands?
A. Right at my lands.

Q. What separated your field from his?
A. Turning row.
Q. Did you notice his crop?
A. Yes.
Q. State if you saw anything peculiar about his cotton crop in the fall of the year?
A. My attention was called to it by him, I think. My cotton was within ten feet of his outside rows. I found in his cotton bolls what we cut open were dark on the inside; the cotton at the ground, or part of the way up the stalk had matured and opened, the remaining cotton, which was green and apparently good, but to cut it open it was dark inside and never did open.
Q. Was that the larger per cent. of the bolls on his crop?
A. Yes.
Q. About how much would you estimate he made on his crop per acre?
A. I do not know; I think there was possibly one-third of it that matured and was good cotton.
Q. Where was the part that matured?
A. At the bottom.
Q. Was your attention called to the ten rows that were spoken of by Mr. Hatchell?
A. No, sir, I did not see it.
Q. What about your cotton, was it all right?
A. Yes, I did not see anything wrong with it. I made an average crop, and it opened to the top.
48 Q. Was it a fair season?
A. Yes, the seasons were fair.
Q. How far did you live from Mr. J. T. Sumner?
A. Five or six miles.
Q. You did not see his crop?
A. No, sir.
Q. Did you see Mr. Kirven's crop?
A. Yes.
Q. What condition did you find on his place?
A. I was at his house on business, if I remember right, one day, and he asked me to walk out in the fields with him and I did so and I found his cotton in a similar condition to that of Mr. Garrison's. His weed was better than Mr. Garrison's and apparently well fruited, but I saw the same results as to the matured cotton such as would open and such as did not open. We cut several bolls while I was out there and it was as dark outside as Garrison's.

Cross-examination:

Q. It was a good weed?
A. Yes; Mr. Kirven's was a very good weed.
Q. All right at the bottom?
A. Yes, as far as I could see.
Q. Good, nice bolls at the bottom and opened right?
A. Yes.
Q. This rotten cotton was towards the top of the cotton?
A. Yes.

P. C. BECK testified:

Direct examination:

Q. Did you go to see Mr. Kirven's crop in '98?
A. Yes.
Q. Do you remember who went with you?
A. Nobody went with me.
Q. How did you happen to go out there?
A. I rode out there to look at his crop.
Q. Did anybody request you to go?
A. Mr. Kirven told me he would like for me to see it, and I went.
49 Q. You went out there to see it?
A. Yes.
Q. What condition did you find the cotton in?
A. I found the most of it in a pretty bad fix, I considered it.
Q. What was the fix?
A. It was rotten.
Q. Where was there any sound cotton on it, if there was any?
A. In the bolls at the bottom.
Q. Did that extend over a very large part of his crop?
A. Yes, the biggest part I saw.
Q. Did you see this cotton between the branch and the Hartsville Railroad?
A. Yes; I saw some good cotton there. You could see it very easy from the road.
Q. Did you have to get out and examine it?
A. No, sir. I did not have to get out and see it, I can tell good cotton wherever I see it.
Q. The blighted cotton, did it have the same appearance as on the home place?
A. Yes.
Q. This good cotton you saw there, did it look like it was all right?
A. Yes; I considered it good cotton.
Q. Did you notice where there were breaks in it, where a stalk of it was some distance in the row from another stalk?
A. Yes.
Q. What was the condition there?
A. I did not see much of that that had any opened on it at all.
Q. I mean where a stalk stood to itself?
A. There was more rotten bolls on it.
Q. Than where it was closer?
A. Yes.
Q. Did those stalks look similar to those he has there (exhibiting bundle of stalks)?
A. Yes.
Q. How about this stalk (exhibiting another stalk to witness)?
A. This looks like the good cotton.
Q. That represents the healthy cotton that you saw?
A. Yes.
Q. Do you remember whether anybody came there or not?

A. Yes, after I got there Mr. R. L. Dargan came there.
50 Q. Who was he representing?
A. I suppose the Chemical Company.
Q. He was their attorney?
A. Yes.
Q. Were you requested by him to go out there?
A. We were all there and he said, "Let's go out and see," and we did all go out together.
Q. You went out with him?
A. Yes, and Mr. Kirven and one more, I forgot who he was.
Q. Was that Dr. Earle?
A. I think it was Mr. Earle.
Q. Four of you went out?
A. I think so.

V. C. REYNOLDS testified:

Direct examination:

Q. Mr. Reynolds, where do you live?
A. Leavenworth Township.
Q. Do you live near Mr. Kirven?
A. About four miles.
Q. Did you see Mr. Garrison's cotton crop in 1898?
A. He called me to his lot and I saw cotton at his lot.
Q. Did you go through it?
A. No, I went to the end of his rows.
Q. What did you see?
A. I saw quite a difference there in the same cotton.
Q. What was the difference?
A. It was late in the season, and there was in the cotton I saw the burrs or pods that had been gathered, and I saw bolls rotten.
Q. That part that had been gathered, how much was that—did you notice the number of rows?
A. No, sir; I just noticed the difference in it. I do not remember about it.
Q. Where was that place where there was a difference?
A. It was right about the center of the field.
Q. Did you discover that without his calling it to your attention?
A. I did not know what he was up to; he hollowed and told me he had something to show me, and when I got there he called my attention to that. All the cotton was gathered; I do not know
51 but that it was the first of December.
Q. You saw some in the middle of the field that was rotten?
A. Yes.
Q. And on either side what did you see?
A. I do not remember but one side being rotten. There was a difference.
Q. On one side you know it was rotten?
A. Yes.
Q. Do you know Mr. T. H. McKay?
A. Yes.

Q. Do you know where he is?
A. I do not know; I have heard that he is dead.
Q. You understand that he is dead?
A. Yes.
Q. Did you see Mr. Kirven's crop that year?
A. Yes, part of it; he stopped me one day and we walked in it a little piece.
Q. What was the condition of it?
A. A few bolls picked out in the bottom—it was along in the first of December and no cotton there.
Q. A few bolls at the bottom?
A. There were a few bolls at the bottom gathered and the other part rotten; the bolls were there dried up.

S. MARCO testified:

Direct examination:

Q. You live in Darlington, Mr. Marco?
A. Yes, sir.
Q. In the year 1898, did you have any transactions with Mr. Kirven about any fertilizer?
A. Yes.
Q. Did you get some from him?
A. Yes.
Q. For whom did you get it?
A. For Bill Gainey.
Q. He was farming on one of your places?
A. Yes.
Q. Did you see the crop that Mr. Gainey made?
A. Yes.
Q. Did you see anything peculiar about it?
A. Yes.
Q. What was it?
A. The bolls did not open.

52 Plaintiff objects to the last question and answer on the ground that there is no evidence that that fertilizer was used on Mr. Gainey's place.

The COURT: I will instruct the jury now that this witness has not testified that the fertilizer was actually used by Mr. Gainey, and that if it does not appear that this fertilizer was used by Mr. Gainey, then whatever this witness or any other witness might say about Gainey's crop must not have anything to do with this case. It must be established that this fertilizer was used there before you can determine what the effect of it was or was not.

Q. What kind of fertilizer was it that he got?
A. I have forgotten. I know I bought the fertilizer from Mr. Kirven, and that is all that I know.
Q. Have you looked at the bolls on Mr. Kirven's stalks?
A. Yes.
Q. How does that compare with the looks of things on Gainey's crop?

A. It was mighty poor, I know; I lost $185.00.
Q. The cotton did not open at all?
A. No, sir.
Q. Did you have other tenants on the same place?
A. Yes.
Q. What about their crop?
A. Their crop was pretty fair.
Q. How far is that from Kirven?
A. I think it is about five or six miles.

WILLIAM GAINEY testified:

Direct examination:

Q. On whose place were you farming in 1898?
A. On Mr. Marco's.
Q. Did Mr. Marco get you some fertilizer that year?
A. Yes.
Q. Who from?
A. J. P. Kirven.
Q. Did you go after it yourself?
A. Yes.
53 Q. Where did you get it from?
A. From his home.
Q. What was it?
A. It was acid, meal and kainit.
Q. Did you use it on your cotton crop that year?
A. Yes, sir.
Q. On Mr. Marco's place?
A. I did.
Q. What kind of a crop did you make?
A. Very sorry.
Q. What was the matter with it?
A. I could not tell; it would not open.
Q. Were there bolls on it?
A. Yes, sir.
Q. They never opened?
A. No, sir.
Q. Did other tenants around on that same place get their fertilizers from Mr. Kirven?
A. No, sir.
Q. What about their crop?
A. Theirs opened. I had about five acres that I did not put any to, and made very good cotton. It did not have nothing to it and it opened.
Q. You did not put anything on it?
A. Yes, sir.
Q. Was that in the same field?
A. Yes; joining the same field. The guano gave out and it made very good cotton.
Q. Did you see Mr. Kirven's cotton?
A. Yes, sir.

Q. Was Mr. Kirven's cotton affected like yours?
A. Yes, sir.
Q. What plantation were you planting on?
A. Mr. Marco's.

Cross-examination:

Q. Where is that place you farmed on?
A. It is in Society Hill Township, between here and Society Hill. They call it the Dr. Smith place.
Q. How many acres did you plant?
A. I reckon I planted forty acres of cotton.
Q. What kind of fertilizers did you get from Mr. Kirven?
A. Acid, kainit and meal.
Q. Did you mix it up?
A. Yes.
Q. You put it all on the same field?
A. Yes, but I lacked about five acres of its going over.

54 Redirect examination:

Q. Did you mix it about as you usually mix fertilizers of that kind?
A. Yes, sir.
Q. You have been farming a long time?
A. Yes, but I have not farmed since then.
Q. That broke you?
A. Yes, I quit.

CHARLES C. SUMNER testified:

Direct examination:

Q. Are you a son of Mr. James T. Sumner?
A. Yes.
Q. Is he alive or dead?
A. He is dead.
Q. Do you remember the crop of 1898?
A. Yes; I was small then; only thirteen years old then.
Q. Do you remember about what condition the crop was in?
A. Yes, sir.
W. What was its condition?
A. We made a very poor crop that year. I do not know what was the matter with the cotton, only it rotted.
Q. Would not open?
A. No, it would not open.
Q. Do you know where your father got his fertilizers that year?
A. From Mr. J. P. Kirven.

R. H. BRYANT testified:

Direct examination:

Q. Mr. Bryant, what part of the county do you live in?
A. I live north from here.
Q. How near do you live to Mr. Kirven?

A. About three miles.
Q. Were you living there in 1898?
A. Yes.
Q. Are you a farmer?
A. Yes.
Q. Did you farm in 1898?
A. Yes.
Q. What kind of season did you have in your neighborhood that year?
A. We had right good seasons.
55 Q. Crops generally fair?
A. Yes, sir.
Q. Did you see Mr. Kirven's crop?
A. No, sir; only his crop on the public road coming to Darlington.
Q. What did you see about that?
A. That was good cotton on the road.
Q. Whereabouts was that?
A. That was between the Lucas branch and the Hartsville Railroad.
Q. You saw some good cotton there?
A. Yes, sir.
Q. Did you see Mr. Garrison's cotton?
A. No, sir.
Q. Did you see Mr. Sumner's cotton?
A. Yes, sir.
Q. What condition was that in?
A. It was in a sort of a bad condition; his cotton rotted a good deal.
Q. How far was your farm from Sumner's?
A. Just a little strip of woods between us.
Q. You say Mr. Sumner's cotton rotted?
A. Yes, sir.
Q. How about yours?
A. Mine did not rot. Mine made a good crop that year.

Plaintiff offers to introduce the testimony of James T. Sumner, now deceased, given in a former trial in the case of the Virginia-Carolina Chemical Company against J. P. Kirven, on the ground that the witness is dead; that the parties are the same and the issue are the same.

Objected to. Objection overruled. Exception noted.

The testimony of Mr. James T. Sumner was read to the jury, being the testimony given by him at the April term, 1901, and found on page 32 of brief of case of Virginia-Carolina Chemical Company against J. P. Kirven.

Also the testimony of T. H. McKay, found on pages 50, 51, and 53 of case between same parties tried November term, 1899.

J. P. KIRVEN recalled.

Direct examination:

56 Q. I omitted to ask you yesterday, Mr. Kirven, if you examined this cotton thoroughly for insects, bugs or worms, or anything of the kind?

A. Yes.

Q. Did you find any evidence of them at all?

A. None in the world.

Q. In what proportions did you mix the acid, meal, and kainit?

A. Four of acid, four of meal and two of kainit; that was the proportion.

Q. That was the formula?

A. Yes.

Q. Have you ever used that formula as a practical farmer before or since?

A. Yes, with mighty favorable results. And that is a general rule with us all through our section of the country; and I think that is about the formula that all good planters have always practiced.

Q. That was the proper formula in which to mix them?

A. Yes.

Q. If these ingredients were all right, and you used that formula, would it, in your opinion as a farmer, and a practical farmer, affect your crop injuriously, or would it make a good crop.

A. It would make a good crop. It is my opinion that it is about the proper formula, and, besides, practical experiments have proved to me that it is just about right, and I have had large experience in planting.

Q. Where did you get the seed you planted that year?

A. I raised them myself.

Q. Did you furnish the seed to plant any of these places where these fertilizers were used?

A. None except my tenants.

Q. Did you furnish Mr. Garrison?

A. No, sir.

Q. Mr. Sumner?

A. No, sir.

Q. Mr. Marco?

A. No, sir.

Q. You did not furnish any of those with seed?

A. No, sir; nor Mr. Gandy.

Q. Did you furnish them anything except guano?

A. No, Nothing but acid, those parties. I think I did let Mr. Sumner have some cotton seed meal.

57 Q. Did the attorneys of the Virginia-Carolina Chemical Company get samples of that cotton that year?

A. Yes, they got samples, a whole lot, and put them in Mr. Dargan's office, and afterwards they destroyed it——

Q. They got it and put it in Mr. Dargan's office, and you know what became of it?

A. Yes.

Q. What became of it?

A. Tore it to pieces and threw it out the back door.

Cross-examination:

Q. How much fertilizer per acre did you use on your crop?

A. I tried to use something like from 800 to 1,000 pounds of the mixture.

Q. What was the proportion?

A. The proportion was four, four, two—four of one, four of another, and two of another.

Q. Four of what?

A. Four of acid, and four of cotton seed meal, and two of kainit.

Q. How many acres did you put that over?

A. I think it was called dissolved bone, and a few tons was called acid on the sack. In some of my farms I used less than that, but I used the same formula.

Q. The acid and the dissolved bone are about the same?

A. I do not know; we used that brand, some dissolved bone, and some acid, but in making my purchases some of my customers wanted acid and some dissolved bone.

Q. Are those two the same thing?

A. I cannot tell you.

Q. You do not know?

A. No, sir; I do not know.

Q. When you say you used four of acid, or four of dissolved bone, what did you use—did you use the bags that were labelled acid or dissolved bone?

A. That is hard for me to tell. I used from both sacks. I considered it the same thing.

58 Q. You used them indiscriminately?

A. Yes, a greater portion of that kind of goods was dissolved bone that I used.

Q. Did you use that out of the bag that was labelled Acid Phosphate, or bags that were labelled Dissolved Bone?

A. I do not know positively. I am confident of one thing, I used some of both.

Q. You say you used about 800 to 1,000 pounds?

A. Something like that.

Q. How many acres did you put that over?

A. I suppose I put it over about 100 acres of corn—something in the neighborhood of 100 acres; and I put it in the neighborhood of 250 acres of cotton—between 200 and 250 acres—something like that. And forty acres I did not get over. I had at least 200 acres of cotton damaged badly, almost ruined. I had not referred to my evidence in this case one particle, and it has been about eight years ago, and this is all from memory that I am giving you these statements.

Q. You only let Mr. Garrison have acid?

A. I think I let him have some acid or dissolved bone.

Q. Mr. Sumner?

A. I do not know whether I let him have acid or dissolved bone,

because some of it was branded dissolved bone and some branded acid.

Q. They are different things?

A. No, sir; I think they are identically the same thing. If there is any difference I do not know it—ground up rock without any ammonia in it, or potash, as I understand it.

Q. Can you let me know which brand you let Mr. Sumner have?

A. I could not.

Q. Can you let me know which brand you let Mr. Garrison have?

A. No, sir, not between the two—acid or dissolved bone.

Q. It was at least one of those two?

A. Yes, sir.

Q. What you let Mr. Sumner have, was one of those two?

A. I let Mr. Garrison have some kainit, but I do not think
59 I let Mr. Sumner have any kainit, but I let him have some of that.

Q. What is kainit?

A. It is mostly potash.

Q. It is rock salt?

A. Yes.

Q. It is mined and not manufactured?

A. I suppose so; I am pretty certain that kainit would not hurt, because I tested it on forty acres and it did not hurt; because all around my place for miles, as far as ten miles, wherever they used that acid or dissolved bone, whichever you call it, it is about the same thing; wherever that was used the cotton was killed, just exactly as mine was, and where it was not used the cotton was perfect. All my neighbors had as nice cotton as could be.

Q. Can you let me know the number of people you sold acid to or dissolved bone to that year?

A. I sold to several parties.

Q. Give me, as well as you can recollect?

A. A dozen or more lienors; of course, they were colored people.

Q. You sold some to Mr. Sumner and Mr. Garrison?

A. Yes.

Q. Take up your lienors and give me the names of all you sold that acid or dissolved bone to?

A. Mr. Garrison, A. Bull, Tom Holliway, and a whole lot of those that testified in the Wilmington matter.

Q. Mr. Sumner?

A. Yes, and Hugh Kirven and Mr. Marco.

Q. That is the same as Mr. Gainey?

A. No, sir; I let Mr. Marco have it and he let Gainey have it

Q. And who else?

A. Wesley Keith. I know I did not collect one cent for that fertilizer, I could not get it.

Q. I am not asking for that, but I want the names of the people that you sold it to?

A. I think that is all that I furnished outside.

Q. Give me now the names of your tenants.

A. Tom Kirven, Louis Dozier—if you will refer to the old
60 record in the old case, you will find where they all have been in the former case, and they have all testified.

Q. How many?

A. Five or six.

Q. About ten more?

A. I do not know that there are ten more.

Q. Tell me how much you let Mr. Garrison have?

A. I could not tell you now without referring to my books.

Q. About how much?

A. I do not know; I will say that statement he made was about correct. I suppose he bought about two tons of acid.

Q. How about A. Bull?

A. I suppose he used about the same.

Q. Holliway?

A. He is sitting over yonder, he could tell you more than I could; about two or three tons, I reckon.

Q. Hugh Kirven?

A. I suppose he got eight or ten tons, something like that.

Q. Mr. Summer?

A. I think he got a carload.

Q. Mr. Marco?

A. He got two or three tons, something like that.

Q. Mr. Keith?

A. A ton or two, something like that.

Q. Tom Kirven?

A. I suppose he got two or three tons.

Q. Louis Dargan?

A. About the same, I reckon. This is only guess work.

Q. The ten others?

A. I do not know whether there are that many or not.

Q. How much on an average did each of the ten get?

A. I will not say that there were ten.

Q. Would it be on an average of two or three tons?

A. Say two tons.

Q. Did you let any more people than those mentioned have any?

A. I might, but I do not remember.

Q. Is it probable that you did?

A. Probably I did.

Q. Probably how many?

A. It is all guess work; I know there are some more elsewhere.

Q. A few more had fertilizer?

A. Yes.

61 Q. On an average what—as low as two tons?

A. I reckon you had better stop there to be certain about it.

Q. If I stop here I can be certain?

A. Yes, somewhere about certain; I think that would about cover it.

Q. How about Mr. Gandy?

A. He got exactly a carload.

Q. From you?

A. Yes, just ten tons, I think.

Q. Did you let any of your brothers, besides Hugh, have any of it?

A. No, sir; I did not let any of the others.

Q. I mean any other member of your family?

A. No, but I think some of them used some of it; exchanged with my brother Hugh, and they got hold of some of it, I think.

Q. Did not one of your sisters use some?

A. I used that for her.

Q. How much did you use on her place?

A. I reckon I used a ton or two, it is a small place.

Q. Did you use any more that way?

A. No.

Q. You were working your sister's place for her and used two tons of it?

A. Yes; I was working it on shares with her.

Q. Were you working with anybody else the same way that you did not mention?

A. Not that I remember.

Q. Can you remember anybody else, except those you have mentioned, that you let have some?

A. No, I do not remember any more.

Q. You did not buy any meal from the Virginia-Carolina Chemical Company?

A. No, sir.

Q. Here is what you bought from the Virginia-Carolina Chemical Company. Seventy-four tons of dissolved bone?

A. I think that is correct.

Q. Seven tons of acid?

A. I think that is about right.

Q. Thirty-five tons of National Special Tobacco Fertilizer, and fifty-five and one-half tons of kainit?

A. I think that is right.

62 Q. Those are the fertilizers for which you gave this note?

A. Yes, I gave a lien and a note for it.

Q. Those were the fertilizers for which you gave the note?

A. I gave McCall a note for it.

Q. Those were the fertilizers for which you gave the note?

A. I told you I gave Mr. McCall a note for it.

Redirect examination:

Q. Those colored people that you spoke of, Holliway and all of those, they were tenants on your land?

A. Yes, most of them, except a few of them; Mr. Sumner and Mr. Garrison were not on my place, but the others were pretty much on my land.

Q. Embraced in the land you have spoken of here?

A. Yes.

Q. I believe you said you had about 300 acres in cultivation that year?

A. Take all of them in, there would be more than the amount I

mentioned. When I said about 200 acres, I meant that was my own individual crop that had no shares in it at all; there were a few crops outside that had shares and a few renters outside.

Q. In furnishing these people fertilizers, you furnished them with the stuff you bought, the acid and dissolved bone and kainit?

A. Yes.

Q. And tobacco fertilizer?

A. Yes; got it out of this lot of stuff.

Q. I asked you as to those you have enumerated, speaking of letting Holliway have two tons; state whether or not——

A. I furnished them all the supplies they used, and I furnished them with meal and acid and kainit and their supplies generally.

Q. You furnished all of those things?

A. Yes.

Q. In testifying about this fertilizer that you furnished, did you embrace all the fertilizer that you furnished them? Mr.
63 Wilcox asked you if you furnished them two tons apiece, is that all you furnished them?

A. No, sir; he was asking with reference to the acid, and that was only a guess. I furnished them meal in proportion and kainit to make up this formula.

Q. And when you got down to that point on this side of the branch, the acid gave out?

A. Yes, the acid gave out. That is why I did not complete the crop out with the same formula of fertilizer, because the acid gave out. I came down to Mr. Coggeshall to get more, and he did not have any, and I went down and said, "Boys, put down the kainit and meal and go on." And I made as perfect cotton there as I ever made in my life, 2,000 pounds to the acre.

Q. In your testimony you say that you did not collect anything for those fertilizers?

A. No, sir; I lost my meal I used there and my kainit, and I lost most of my supplies. I barely got the rent where I rented it.

Q. Why did you not get pay for those things?

A. Because it was not made, it was all killed like that (pointing to bundle of cotton stalks).

Defendant objects as irrelevant statement that witness did not collect anything.

W. L. Flowers recalled:

Direct examination:

Q. Are you a practical farmer?

A. Yes, sir.

Q. Have you been at it all your life?

A. Yes, sir.

Q. Do you use fertilizers?

A. Yes, sir.

Q. You have heard the proportion in which Mr. Kirven says he mixed his ingredients, that is, in every 1,000 pounds putting 400

pounds of acid, 400 pounds of meal and 200 pounds of kainit, what do you say as to that being the proper mixture for the ingredients?

A. That is the way I have been in the habit of mixing it, and find it pays me better to mix it that way.

64 Q. You find that to be the proper mixture?

A. Yes; I cannot tell the analysis of each one, but that is my experience.

Q. When you make up a thousand pounds?

A. I put in 400 pounds of acid and 400 pounds of meal and 200 pounds of kainit.

Q. That makes the mixture you find to be a good mixture on your lands?

A. Yes.

Q. A good mixture for cotton?

A. Yes.

Q. What results have you always obtained when you used that mixture?

A. I think it pays me better than most any other way.

Q. If those ingredients in that proportion are all right, will that injure the cotton crop?

A. I have never had it to injure a cotton crop for me. I do not know what the mixture was that Mr. Kirven fixed.

Q. What did you say about the cotton crop of Mr. Kirven, about its being injured by something?

A. It was the worst that I have ever seen. I went over it to satisfy myself. I wished everybody could have seen it as I did. I felt interested——

Q. You were a farmer yourself?

A. Yes, sir.

Q. You went over it thoroughly because you were interested?

A. Yes, sir.

Q. Did you make a thorough examination?

A. Yes, sir, the best I could.

Q. Tell us whether you examined for insects or anything of the kind?

A. Yes.

Q. Did you make a close examination?

A. I looked expecting to see a boll bored in or pierced by something.

Q. Did you find anything?

A. No, sir.

Q. Any sign of it?

A. No, sir.

Q. Were you able to detect where that good cotton was by the side of the other—were you able to detect that without going in the field?

A. Yes, riding along the road.

65 Q. You could even tell the difference at night riding along the road?

A. Yes, riding along the road you could even tell the difference at night riding along the road.

Q. Were you very much interested in it?

A. I was.
Q. Why?
A. Because I was farming myself.
Q. You were not financially interested in it?
A. No, sir; I did not go there to Mr. Kirven's on Mr. Kirven's account. Seeing Mr. Sumner's crop almost in the same condition and hearing about it in different places I went to satisfy myself as much as anything else.
Q. You were making investigations for your own satisfaction?
A. Yes, sir.

Cross-examination:

Q. You looked for bugs?
A. Yes, I had heard of boll weevils.
Q. You were looking for insects?
A. Yes, sir.
Q. You did not find any?
A. No, sir.
Q. Did you have a microscope when you were looking for bugs?
A. I did not, but I thought about it this way——
Q. You could see at night?
A. I could see the difference at night. I did not mean a real dark night.
Q. You mean a moonlight night?
A. Yes, and a starlight night.
Q. Could you see it from the road?
A. Yes, the rows run right out to the road, and you could see it.
Q. Do you think you could have seen the bugs at night?
A. No, sir; I do not think I could; but, Mr. Willcox, I would like to say this: I thought about it in this way for my own satisfaction, that any bugs that would ruin that cotton——

Objected to as not being responsive to the question asked.

Redirect examination:

Q. Now, Mr. Flowers, make your statement as to why you looked and how you looked?
66 A. I looked for them and could not see them, and I thought any bug or worm, or whatever it might be that would ruin that boll of cotton that I could see.
Q. Did you cut open many of the bolls?
A. Yes.
Q. Did you see anything indicating bugs or worms inside?
A. No, sir; it was a dark looking stuff when you cut through it.

M. S. HAINSWORTH testified:

Direct examination:

Q. Mr. Hainsworth, what has been your occupation in life?
A. Planting.
Q. Where do you live?
A. In Florence County?

Q. Have you used fertilizer in your planting operations?
A. Yes, sir.
Q. Taking a mixture of 400 pounds of acid for dissolved bone, 400 pounds of cotton seed meal and 200 pounds of kainit, what would you say as to that being a proper mixture of the fertilizer for cotton and for bringing about good results?
A. That is a good mixture. I have used it that way for fifteen or twenty years.
Q. With good results?
A. Good results.
Q. If the ingredients are all right, will it injure cotton?
A. I think not.
Q. If the ingredients are all right, will it make a good cotton crop, the season and cultivation being proper?
A. Yes.
Q. Have you ever used fertilizers purchased from the Virginia-Carolina Chemical Company?

Objected to, as it is not this fertilizer in question.
Objection overruled.
Exception noted.

Q. Answer the question Mr. Hainsworth.
A. It has been four or five years ago since I bought any from them; before that I bought it from them altogether for four or five years.
67 Q. What did you use the fertilizer on the last time you bought from them?

Objected to as irrelevant.

Q. Upon what did you use that fertilizer and with what results?

Objected to.
Objection sustained.
Exception noted.

Q. You say you have been a practical planter?
A. Yes, sir.
Q. About what size operation have you usually run?
A. About a twelve-horse farm.
Q. About how many years have you been engaged in that business?
A. About forty years.
Q. About how much of that time have you been using fertilizer on your crops?
A. Forty years.
Q. Have you noticed the effect of fertilizers and studied the question of fertilizers and the results in all of that time?
A. Yes; I have noticed the results wherever I could.
Q. For what reason did you give those things your attention?
A. Because I wanted to ascertain the effects it had on the crop in the different years. Some years I would get good results, some years I would get nothing. On that account I noticed very closely.
Q. If you found a crop of cotton with a good season, just enough

rain to make it, on good land, well cultivated, with probably 150 or 200 acres, fertilized with the mixture containing acid, meal and kainit, and on the same plantation, and the field separated only by one row, you found cotton which had only meal and kainit under it, and if you found that the same lot of acid was used on different plantations widely separated from each other in different neighborhoods, and you found that where the acid or dissolved bone was used that the cotton was blighted and refused to make a crop, and the bolls rotted on the stalk, and along beside it, where the acid or dissolved bone was not put, it made a perfect crop, what, in your judg-
68 ment, would you attribute the damage to?

Objected to on the ground that the question is asked the witness purely as an expert, upon a suppositious state of facts. If Mr. Hainsworth says that he knows the scientific effects, his testimony would be competent.

The COURT: As I understand it, the witness has stated that he has a long experience in planting and the use of fertilizer. I do not understand that he has testified that he has had a long experience experimenting, so to speak, with the use of any particular kind of fertilizer or any particular ingredients of fertilizer, but merely that he has been a planter for a number of years, and has used fertilizers constantly during that time, and, of course, has seen the effect of fertilizers.

Mr. STEVENSON: If your Honor will pardon me, the witness does say that this very stuff that was used on this crop of Mr. Kirven's, this mixture, was a proper mixture, and with good seasons, would always produce good results, and that he has had years of experience in these sort of things, and from his experimenting practically with fertilizers he has come to the conclusion that that is about the best formula that could be used to produce the best results in farming, and that he has been farming for forty years; he states the facts upon which he bases this opinion.

The COURT: He is called upon to give his opinion to the jury for the reasons why certain effects followed in the use by the plaintiff here of certain fertilizers. Now, if opinion evidence in any case is worth anything, it is simply to enlighten a jury about matters that an expert is better qualified to express an opinion upon than a jury are to form an opinion, and it seems to me that whether this was a hypothetical case or a real case, that the jurors can form an opinion of their own as adequately upon the facts testified to as they can upon the facts testified to plus the opinion of this witness. I do not
69 think it is a case within the range of opinion evidence in arriving at the issues, and I would, therefore, be bound to sustain the objection.

Exception noted.

R. C. COMMANDER testified:

Direct examination:

Q. Where do you live Mr. Commander?
A. In Florence.

Q. Have you ever engaged in planting?
A. Yes.
Q. Are you still so engaged?
A. Yes.
Q. How long have you been engaged in that business?
A. About twenty-five years.
Q. Have you ever been accustomed to using fertilizers?
A. Yes.
Q. What do you say as to the mixture of four of acid, and four of cotton seed meal, and two of kainit being a proper fertilizer in this country for cotton?
A. That is the formula I use.
Q. When your ingredients were all right, what results does it produce?
A. Good.
Q. If those ingredients are all right and the seasons are all right, and the cultivation is all right, could it produce a good crop?
A. Yes.

Cross-examination:

Q. Suppose frost were to fall on it and kill it before you got the results, would it still do it?
A. So far as the fertilizers are concerned.
Q. You mean to say it would invariably produce good results?
A. I say so far as the fertilizers were concerned. That is what I answered on—if the seasons were good.

70 Redirect examination:

Q. Look at this stalk and tell us whether that has the appearance of having suffered from frost?
A. No, sir; no frost there.
Q. What does that look like?
A. Full maturity.
Q. Good, healthy stalk of cotton?
A. Yes.
Q. A stalk that is eight years old and looks that way would be healthy cotton?
A. Yes.
Q. Does this (exhibiting another stalk of cotton) have the appearance of having been killed by frost?
A. No, sir; that is not frost.
Q. You take a field of cotton of 200 acres, the season a fair season, the cultivation all the same, the treatment the same, with the exception that in part of it the mixture is acid or dissolved bone and cotton seed meal and kainit and in the balance of it the mixture is only cotton seed meal and kainit, and you find that the cotton there in the part where only cotton seed meal and kainit were used to be like that healthy, well-developed sample of cotton, and you find that the part that had the addition of the acid to be like this (exhibiting specimen stalk to witness), the bolls practically all rotten and unhealthy, and upon investigation you find that wherever in the neighborhood

around that same purchase of acid was used under cotton, the same result was obtained, as shown in this unhealthy stalk here, and that where that acid was omitted, even in fields where there were only a few rows in the middle of the fields and the acid was omitted from the mixture, you found that those rows where it was omitted to be healthy, well-developed cotton like this, and in the other rows to be unhealthy, rotten-bolled cotton, what, in your judgment, as a farmer of experience in the use of fertilizers and in farming, would be the cause, and to what would you attribute the damaged condition of that cotton?

71 Objected to on the same grounds above stated.
Objection sustained.
Exception noted.

Q. Have you ever bought fertilizer from the Virginia-Carolina Chemical Company, and if so, what use did you make of them?

Objected to as irrelevant.
Objection sustained.
Exception noted.
Plaintiff introduced, subject to objection as to its relevancy, Record No. 4556 in the case of Virginia-Carolina Chemical Company *against* J. P. Kirven.

Defense.

P. H. FULLER testified:

Direct examination:

Q. Mr. Fuller, what is your business?
A. Superintendent of a fertilizer factory.
Q. How long has that been your business?
A. I have been superintendent since about '95.
Q. How long have you been in the business of manufacturing fertilizers?
A. Ever since I was a lad 18 or 19 years of age.
Q. How old are you now?
A. Forty-two.
Q. What has been your business experience?
A. First with the old Hume Bros. & Co., which was afterwards merged into the Baldwin Fertilizer Company, of Savannah, and then with the Commercial Fertilizer Company of Savannah; afterwards with the Berkeley Phosphate Company, and during the time that I was superintendent there, the Virginia-Carolina Chemical absorbed the Berkeley, and I was afterwards transferred as superintendent to the Atlantic and Chicora at Charleston, and from there to Ohio, where I built and operated a factory at Columbus; since
72 then I have been in Anderson, S. C., as superintendent of the Anderson Phosphate and Oil Company, where I am now.
Q. Is that a part of the Virginia-Carolina Chemical Company?
A. No, sir; an independent organization.

Q. Were you superintendent of the Berkeley Company in 1898?
A. I was.
Q. Was that a branch of the Virginia-Carolina Chemical Company from which the fertilizer bought by Mr. Kirven was shipped to him?
A. Yes, sir.
Q. What fertilizers did you manufacture at that point which was shipped to Mr. Kirven?
A. We manufactured various grades of fertilizer.
Q. What grades were manufactured there that were shipped to Mr. Kirven?
A. Acid phosphate or dissolved bone; it is one and the same thing. My recollection is we shipped some eight, two, two, which was branded as a tobacco fertilizer.
Q. We are not concerned with the tobacco fertilizer in this inquiry; what is the difference between acid phosphate and dissolved bone?
A. There is no difference. It depends upon, of course, the brand on the bag. Some factories will designate one containing a little potash, but acid phosphate and dissolved bone shipped from there is the same thing.
Q. Tell us how the acid phosphate or dissolved bone, which you say is the same thing—tell me how that is made, and afterwards let the jury understand how it is made from the beginning?
A. The two separate and distinct materials used, the phosphate rock is ground and treated to sulphuric acid, and sulphuric acid is made there and the two mixed together in a mixing pan. The formula used in making the acid phosphate at the Berkeley works was about 1,200 pounds of ground phosphate rock to 1,000 pounds of 52 degrees sulphuric acid. That was mixed up together and dumped into a storage shed all during the year.
Q. Is that the regular plan of manufacturing?
73 A. That is practically the formula used for the manufacture of acid phosphate.
Q. Is that method the standard?
A. Yes, that is practically what is used.
Q. Is that the method used by other companies?
A. That I know of, yes.
Q. Do you use that method now?
A. Yes.
Q. Is that the method that was used in this particular fertilizer?
A. It was.
Q. What was the result when you mixed 1,200 pounds of ground phosphate rock and 1,000 of 52 degrees sulphuric acid that is mixed together?
A. Yes, in the mixing pan and stored together until it is thoroughly acidulated and dumped into a car and taken to the storage shed and put in a pile where it is stored for future shipment.
Q. Was that all that was put in this particular fertilizer?
A. That was all.
Q. What grade rock was it?

A. We used rock from the Bolton mines practically entirely, which analyzed about 60 or 62 per cent. of bone phosphate of lime.

Q. Where is the Bolton mine?

A. About five miles out of Charleston, on the Stono River. That is South Carolina land rock.

Q. What is the grade of that rock?

A. There are a great many grades of rock. The land rock about Charleston runs practically about 60 per cent. bone phosphate of lime.

Cross-examination:

Q. How many thousands of tons were shipped from the Berkeley mills that year?

A. The annual output of the Berkeley was about fifty-odd thousand tons a year of acid phosphate.

Q. How much dissolved bone?

A. That is the same thing; we know them as the same thing at the factory.

Q. You were superintendent at that time?

A. Yes.

74 Q. It was then a branch of the Virginia-Carolina Chemical Company?

A. Yes, at that time when these shipments were made.

Q. What time of the year did you generally ship out the goods?

A. During the spring and winter months. Some shipments were made all of the year, but the majority of the shipments went out in the late winter and spring.

Q. What other branches of the Virginia-Carolina Chemical Company were there at that time that you know of in Charleston and elsewhere?

A. I don't know that I can tell you from memory what they were at that time elsewhere, but in Charleston they were the Berkeley, the Ashley, the Wando, and the Atlantic and Chicora. I do not recall any others.

Q. Now, the S. W. Travers & Co. branch, is that part of it?

A. I think their factory was in Richmond.

Q. That was another branch?

A. Yes, sir.

Q. Of the Virginia-Carolina Chemical Company?

A. Yes, sir.

Q. Look at that and see if that is one of their circulars (exhibiting paper to witness)?

A. I do not know that I can say positively whether it is or not; it has their name on it, and I presume it is.

Q. This tobacco fertilizer was the national special tobacco fertilizer?

A. That is my recollection.

Q. Do you recollect the composition of that?

A. I can tell you from a memorandum which I have.

Q. Have you got it with you?

A. Yes.

Q. Tell us, please.

A. Eight, two, two. We know those things entirely by their grade, and that was an eight, two, two fertilizer.

Q. Made especially for tobacco?

A. It was made to fill any eight, two, two brand. It contained 1,000 pounds of phosphate rock, 800 pounds of fifty-two degrees sulphuric acid and 200 pounds of blood containing 16 per
75 cent. ammonia and 400 pounds of tankage, containing 4 per cent. ammonia and 90 pounds of muriate of potash, containing 50 to 52 per cent. potash.

Q. You use muriate of potash in the manufacture of tobacco fertilizer?

A. Yes.

Q. Did you use in the tobacco fertilizer the same phosphate rock that you used in the other?

A. Yes.

Q. From the same mine?

A. Yes.

Q. Have you noticed the National Special Tobacco fertilizers guaranteed analysis by S. W. Travers & Co. as contained in their circular there?

A. This is the first time I have seen that. That conforms with the analysis in this formula.

Q. Except it is sulphate of potash?

A. Muriate of potash when it is treated with sulphuric acid becomes sulphate of potash.

Q. Is not the proper formula for making the best tobacco fertilizer the sulphate of potash?

A. It becomes the same thing when treated with sulphuric acid.

Q. Is not there a difference of about 10 per cent. in the commercial value in muriate and sulphate of potash?

A. I am not prepared to say.

Q. The Clemson College Experimental Station, what do they do there relative to fertilizers?

A. Keep after the fertilizer factories.

Q. Why do they have to do that?

A. To see that the analyses always run according to the guarantees.

Q. To make the stuff right?

A. Yes.

Q. If they did not, some of it would lapse?

A. I suppose occasionally.

Q. Pretty bad, too. Look at that (showing pamphlet to witness), do you not find that sulphate is 10 per cent. higher than muriate?

A. This is sulphate of potash as bought originally in Germany
but, as a matter of fact, muriate of potash becomes the sul-
76 phate of potash when treated with sulphuric acid. I am not enough of a chemist to go into the chemical change, but that is a fact.

Q. It would be impossible for there to be any muriate of potash in a fertilizer mixture then?

A. It is potash.

Q. It becomes sulphate of potash before it gets to be potash?

A. No, sir.

Q. Where is the distinction?

A. As I understand it, the muriate of potash is a mixed article, and the sulphate of potash is a treated article. It is the same thing treated with sulphuric acid, in making a wet mixture where all the ingredients go into the pan, muriate of potash, when it is treated in a pan with sulphuric acid, becomes a sulphate, but we are after a potash soluble in water, and if we get a guarantee of 2 per cent., that is all we want.

Q. I believe you said this was one of Clemson Agriculture Bulletins?

A. Yes.

Defendant introduces bulletin of Clemson Agriculture College, No. 60, issued April, 1901. (Counsel reads from bulletin.)

Q. Now, how could you use muriate of potash in a tobacco fertilizer and advise its use?

A. I rather think that refers to the article in its crude form. The muriate of potash and the sulphate of potash, as they come from Germany, are separate and distinct articles, containing about the same per cent. of potash, but, as I have before explained, the muriate of potash, treated with sulphuric acid, becomes a sulphate.

Q. You find that the Clemson authorities advise against using muriate of potash in a tobacco fertilizer?

A. In its crude form, I think.

Q. When you put acid phosphate, or dissolved bone in sacks and carry it over from one year to another, what effect does it have on the sacks?

A. The sacks are usually rotten.

Q. What causes them to be rotten?

77 A. The action of the moisture from the atmosphere getting into the acid phosphate attacks the burlap.

Q. The sacks are eaten up?

A. A kainit sack will act in the same way.

Q. The acids in the fertilizer have no effect on them?

A. I do not think it is the acid; I think it is the acid phosphate with the moisture.

Q. What effect does the moisture have on the acid phosphate?

A. Acid phosphate absorbs it to a certain extent.

Q. You do not know the chemical result of that?

A. I know it destroys the sack.

Q. In the shipment of a great number of tons of fertilizer, which you ship during the year, I do not suppose you can tell, from your own memory, exactly what fertilizers were shipped and what not, you have to rely on memory?

A. I have to give the formula for the mixture of each grade of the

fertilizers to my help, and it is my business to see that they carry out those orders as well as I can.

Q. That is for mixing?

A. Yes, and manufacturing and shipping.

Q. When it comes to shipping, these that are stored in the separate compartments, the different kinds of fertilizers, the shipments are made to hundreds of people in a business like that?

A. Yes, of course.

Q. And you do not remember, of your own memory, exactly what was shipped to any particular customer; you have to rely on your books as to what each customer got?

A. Yes.

Q. And as to when they got it?

A. Yes.

Q. So far as your statement as to when and what was shipped, that is merely got from your books?

A. Yes.

Q. In the manufactory of fertilizers, what do you call a filler?

A. Anything to be used, as the word implies.

Q. For what reason is that filler used?

A. To reduce the analysis.

78 Q. What is the result of reducing the analysis—what is your object?

A. If we make, for instance, a stock of 14 per cent. representing, probably, twenty-five or thirty thousand tons known as our 14 per cent. acid phosphate, and somebody wants to buy a hundred tons of 10 per cent. acid phosphate, we, of course, cannot give him the material as it stands at 14 per cent.; some filler has to be weighed with the 14 per cent. goods to make up a ton, so as to reduce the analysis from 14 per cent. to 10 per cent. In the 10 per cent. goods I would want 200 pounds of phosphoric acid and 14 divided into 200 would give me the number of pounds of acid phosphate I should use to give me a 10 per cent. goods, and the difference between that weight and 2,000 pounds would give me the filler. We would have to take about 1,450 of the 14 per cent. acid phosphate to make a 10 per cent. article, and that would be 550 pounds of filler.

Q. That filler is put in there to make weight?

A. Yes.

Q. Sand out of the street, or anything convenient?

A. Anything that is convenient.

Q. Now, that immense pile of acid, amounting to fifty-odd thousand tons, what was the analysis of that acid?

A. Fourteen per cent. was what we made. That was what we tried to make always, to run from 14 per cent. and over, as a rule.

Q. If you use 10 per cent. goods you would have to put in about 550 pounds of filler?

A. Yes, to every ton.

Q. If you use 13 per cent. goods you would have to put in a smaller amount of filler?

A. Yes.

Q. The filler which you put in you say you put in to make the ingredients come up to 2,000 pounds?

A. Yes.

Q. Now, in the manufacture of fertilizers, what do you have to have in order to get the sulphuric acid?

A. Pyrites and nitrate of soda and steam.

Q. From the manufacture of sulphuric acid, do you have a very large amount of residuum?

A. Yes.

79 Q. What do you have?

A. Practically pyrite cinders, and some nitrate of soda cake, which is also left.

Q. It is not left in the shape of nitrate of soda?

A. No, sir; soda cake.

Q. The nitre cake, what is that?

A. I do not know what it would be scientifically called. It is a stuff they make glauber salts from. It must be a soda salt of some kind. I do not know the chemical name of it; we know it as nitre cake.

Q. The pyrites of iron or cinders, that is the pyrites of iron after you have roasted out the larger per cent. of sulphur?

A. Yes.

Q. Is that pretty heavy?

A. Yes, quite so.

Q. What is its appearance?

A. A reddish brown.

Q. Do you know the composition of that cinders that is left there?

A. It is iron largely, some silica, possibly some copper and it may be a little arsenic.

Q. Still some sulphur left in it?

A. A little sulphur.

Q. That is about the composition?

A. Yes.

Q. Do you accumulate a large quantity of that around the plant?

A. Yes.

Q. Very abundant?

A. Very much in the way.

Q. About what proportion of sulphur is left in there?

A. We have analyses made of the cinders every week to know whether we have burned out all of the sulphur. Usually there are about 1½ to 2 per cent.

Q. Then there is the iron?

A. Yes.

Q. And a little copper?

A. Yes, and a little copper.

Redirect examination:

Q. Mr. Fuller, was there any filler used in this fertilizer?

A. No sir, none at all.

80 Cross-examination:

Q. The ten per cent. goods that you shipped here, how was it that you did not use any filler in that?

A. He asked me the fertilizer.

Redirect examination:

Q. What do you mean by the fertilizer; which was the fertilizer?

A. I know a fertilizer as a complete manure, containing ammonia, potash and phosphoric acid.

Q. That is the tobacco fertilizer?

A. Yes; 8, 2, 2.

Q. Now as to acid phosphate or dissolved bone, do you have a filler in that?

A. There were two grades of the acid phosphate shipped, one ten per cent. Of course, there was a filler in that. There was a 13 per cent. dissolved bone or acid phosphate, there was no filler in that at all. There was a filler used in that 10 per cent. acid phosphate. I think it was the "Champion," if I remember correctly, but the 13 per cent. goods, the dissolved bone, the 13 per cent. goods, there was no filler used in ours.

Q. What was it that was used in the other?

A. Marl.

Q. What is marl?

A. Marl is a formation of lime, which is used largely for a drier and used for a fertilizing ingredient of itself. At that time I do not think the department of agriculture gave it any value, but it does now, and puts a tax on it.

I do not think that at that time the department recognized it as of any value.

Recross-examination:

Q. The department has now come to requiring some notice to be taken of the filler that is put in also?

A. No, sir, that is marl shipped of itself. There is quite a quantity of marl used as a fertilizer of itself.

81 Q. How do you get the 14 and over per cent. acid down to 13 without putting a filler in it?

A. Because one per cent. is not reduced.

Q. You said these goods were all 14 per cent. and over?

A. Yes.

Q. I ask you if you ship 13 per cent. did you have to put in a filler?

A. I told you I did. You asked me if it is reduced to 13 would a filler be used, as I understood your question.

Q. These 13 per cent. goods that you shipped, you did not reduce them?

A. We did not reduce them.

Q. What was the analysis of those goods—of the dissolved bone and acid?

A. The guaranteed analysis was convertible phosphoric acid 13 per cent.

Q. Dissolved bone?
A. That was the same.
Q. What about the 10 per cent.?
A. That, of course, was reduced.
Q. It was bound to be reduced by a filler?
A. Yes.
Q. I believe Mr. Kirven's goods were shipped out about the last of March, were you pretty well done shipping then?
A. I cannot recollect now, it is too far back. I would think our stock was pretty well shipped out at that season of the year, usually we had finished shipping about the middle of April and about that time we ought to have a larger part of our stock moved.
Q. This was being shipped about the last of March and you would say that you were pretty well down to the bottom?
A. No sir, I would say that larger part of our stock was shipped out.

Professor J. S. NEWMAN testified:

Direct examination:

Q. Professor, where were you raised?
A. At Walhalla, S. C.
82 Q. You reside there now?
A. Moved there last October.
Q. What has been your business?
A. It has been very varied. I have been connected with college work for twenty years, until last year, as professor of agriculture and director of experimental stations in Alabama and South Carolina.
Q. At what points?
A. At Auburn, Alabama, and Clemson College, S. C., with branch stations in each State.
Q. How long have you been at Clemson?
A. I was there about ten years altogether.
Q. What was your position there?
A. Professor of Agriculture, Agriculturist of the Station and Director of the Agricultural Station, and for a year or two director of the Farmers' Institutes of the State.
Q. Explain to us the action of fertilizer on a growing plant?
A. Out of the seventy-odd chemical elements there are only about fourteen that are necessary for the plant; and it has been found that only three of these are usually necessary to be applied to the soil as needed; the others are generally present in sufficient quantity and hence not generally put in fertilizers. In some sections, New Jersey and Rhode Island, lime is added as one of the essentials, because of its deficiency in those soils. The only elements that are so exhaustive as to make it necessary to resupply them are phosphoric acid, which causes fruitage especially, and contributes to the growing; nitrogen, which increases the weed and size of the plant and, in too great quantity, may be used to the disadvantage of the plant, and thereby reduce the production; potash, which seems to

have the effect—though it is not so well known as the others—of strengthening the fibre of the plant and also it has an influence as a fungicide. South Carolinians understand that kainit is used to prevent rust in cotton. Rust is a fungus growth, and whether it is the chloride of potash which does it is not positively known, but the fact is established that it does prevent rust on cotton, and,
83 of course, has a similar effect in any other fung-us growth.

Q. It is testified here that on some places that there was from 800 to 1,000 pounds of fertilizer used on cotton crops in 1898—assuming 800 lbs., that much used per acre—four parts acid phosphate, four parts cotton seed meal, and two parts kainit, and that after that was used on a cotton crop, that this growth (showing bundle of cotton stalks) as to roots, stalk and fruitage was the result?

A. I heard the statement that the growth of the plant was vigorous and healthy and that only the boll, as I understood it, was diseased; am I correct in that?

Q. The result is that, that he has got here; this is the result (showing bundle of cotton stalks).

A. I have seen that in the field; I have seen it in Marlboro and other places.

Plaintiff objects to witness stating what he saw at other places, except those along with the crops under investigation.

Q. I ask you, if results of this kind could be due to fertilizer?

Objected to.

Q. I ask you if this result (showing cotton stalk) could come from the use of the fertilizer?

A. The effect of fertilizers often induce fung-us growth. If it causes a very rapid, succulent, tender growth of the plant, it is favorable in warm, moist weather to the production of fung-us diseases and the fungus is sometimes developed on the leaf as in the case of cotton rust, but more often in the fruit. For instance, I suppose there would be no objection to my illustrating the similar effect of the rotting of fruit in cases in which the fruit rots while the plant is healthy. Now in the case of the apple we have the bitter rot, the soft rot, and scab, which affects the fruit alone and does not affect the plant. The tree will be apparently perfectly healthy. Last year I lost forty bushels from two trees that dropped from the scab, while a peculiar circumstance connected with it was, there
84 was another variety grafted on the same tree not affected by the scab at all. So that you very often find a plant perfectly healthy, growing and blooming and the fruit rotting. That is owing to certain conditions in the growth of the plant or the presence of these fung-us spores. Everything comes from a germ in animal and vegetable life. Now we are very particular, for instance, in pear blight, to destroy all of the diseased wood, burn it, because if it is left there the germs of that disease will spread the next spring. So in grain and in cotton, where the fruit rots, and that dead fruit is left as it is on those stalks on the land, the spores of that disease will be in the land the next year, and ready to attack the next crop

of cotton or grain. That is one reason we rotate our crops to get rid of those—planting some crops they will not attack and so starve them out.

Q. Did any fertilizer poison that crop (indicating bundle of cotton stalks)?

A. It would not result in simply poisoning the bolls if it did. If a plant is poisoned the best evidence is in the leaf: the whole plant would be affected. It is very common for fruit to rot: it is the effect of fung-us growth: and sometimes if the leaves are attacked by the poison or fung-us growth, then the whole plant suffers, because the leaves constitute the lungs of the plant. No plant can live without leaves; but if any plant is poisoned, it would be manifest over the whole plant.

Q. How about the stalk, the body of it?

A. It would kill the leaves, and the stalk would naturally die.

Q. Is that a healthy stalk (exhibiting stalk of cotton)?

A. It seems to have been: I cannot tell now about it.

Q. What would you say as to the fertilizer being the cause of the growth of a plant of that size, and that it was stated that, beginning in August, or after August, in the high stage of its growth, that it poisoned the crop by attacking the top of it—the bolls—and leaving the under bolls to open.

A. As I said, the very rapid growth of a plant has the
85 tendency to produce fung-us disease on the plant. For instance, we do not fertilize our pear trees early in the season, not until after they have bloomed, because the bacteria attacks the tender parts of the plant and the bloom buds, and we withhold the application of the fertilizer until after this period has passed over. The tender growth of the plant, the very vigorous, succulent growth predisposes it to this fungus growth.

Q. What is the difference between that and poison of the crop?

A. I have never seen any poison of a crop, never saw anything used that caused the poison of a plant excepting that a large quantity of salt will poison a plant. That is due to the quantity of hydro chloral acid which used in large quantity will poison flowering plants; used in small quantity will kill the germs of the plant. Just like we spray with Bordeau mixture to kill the germs in fruit trees or tomatoes or potatoes, or anything else. We used that before these spores have started into life. That prevents the germination of the spores and consequently stops their development. We do not get any healthy grapes unless we use it now. I first observed the effect of potash in '84 in preventing cotton rust. It was so marked in my experience, so much more rust where potash was not used, that I took my senior class out to the fields to show them its effect.

Q. What is cotton rust?

A. A fung-us growth on the leaf.

Q. What is a fung-us growth?

A. It belongs to the mushroom family.

Q. Is a spore a living germ?

A. Yes, it belongs to a class of plants. This fungus in this boll

has been examined by a bacteriologist and classified by name. I sent a botanist, an entomologist and bacteriologist down here.

Plaintiff objects to witness stating as to the bacteriologist and entomologist as hearsay.

Mr. WILLCOX: How about that bulletin which my friend introduced?

86 The COURT: If that objection had been raised, I would have ruled that it was incompetent.

Q. What is the matter with those bolls?

A. Rotted.

Q. What caused it?

A. Fung-us growth.

Q. What is a fung-us growth?

A. It is a non-flowering plant, which preys upon the life of other plants. Moss, which you see on trees, is a fung-us growth, and it feeds on its host—the tree it lives on; so all kinds of rust are fung-us growth and mushro-ms included. I suppose every boy had amused himself by treading on the devil's snuffbox and seeing the dust go out. That dust is the spores of that fungus, and each one is capable under favorable conditions to produce another plant like it. So we grow mushroom from the spores in places prepared for the purpose; and after moist weather we see those mushrooms come up in grass lands and about stables and so on.

Q. Can that fung-us growth, which you say is a living germ of some kind, be produced by a fertilizer?

A. Not unless the germs or spores are in the fertilizer which is applied to the soil.

Q. Will acid produce it?

A. No sir, acid would be apt to destroy it—if you mean by acid, acid phosphate. I do not see how acid phosphate can, unless the spores of the fungus are in the preparation, and they would die if they were in there probably. I do not know that I can illustrate it any better—most of the farmers are familiar with stinking smut in wheat, and this is very much like that, the smut affects the grain, the grain is rotten and has a disagreeable odor and hence it is called stinking smut. We kill that germ. The spore is on the grain we sow and we use copper sulphate or blue-stone to destroy that germ before we sow the wheat, or use hot water, which answers the same purpose. That does not affect the weed at all, the weed looks perfectly healthy, but examine it and the grain is a mass of rotten blackness. There are hundreds of illustrations in plant life where

87 the fruit rots from the effect of fungus growth where the plant is healthy.

Q. Were those results you speak of produced by the fertilizer which in itself acts as a poison?

A. No, sir. It may act as an inducement for the development of the fungus by the rapid succulent growth, but cannot poison it.

Q. What is the purpose of the fertilizer?

A. To make food for the plant, partly to make growth and partly to make fruitage.

Q. What is the effect of acid phosphate?

A. The phosphorus in the acid phosphate produces fruit and hastens the maturity of the plant. That is plainly developed in all experiments.

Q. What about that bought by the average farmer and put on his cotton crop?

A. That is to make fruit by having that in proper combination with nitrogen and potash. You make a well-balanced development of the plant. You can apply too much nitrogen, for instance, in wheat. Every man who has used cotton seed on his wheat knows where he puts out a pile of cotton seed to be scattered he does not get any wheat. He gets a magnificent growth of stalk but no wheat. It all lodges or falls down, or rusts, because of its tender succulent growth.

Q. How would you get rid of cotton boll rot?

A. I do not know that I can say positively; but I would not plant any of that land any more for some time, until I planted something that they would not attack. I suppose it would be legitimate to illustrate how they got rid of the cotton blight or wilt on the Sea Islands. You find some people that can go through small-pox or yellow fever without taking it, they are immune. Now some plants resist disease, and right in this wilting area they found plants not affected by it at all. They then took these plants and planted them on the same land and had healthy plants, and next year, because the off-spring
88 from those immune plants were immune also, they planted them and in that way they got rid of it.

Q. What would be your opinion as to how to get rid of that particular cotton boll rot there?

A. Rotate the crop and not plant cotton on that land.

Q. Why would that be advisable?

A. Because the spores from these dead bolls will be in the land. They live through the winter and reproduce next year.

Q. What effect does acid phosphate have on a germ, either a spore or an animal germ?

A. The tendency would be to destroy it. You see its effect on vegetable products in its destruction of the bags in which it is put; and it would destroy spores if embodied into it.

Q. Is it a germ producer or germ destroyer?

A. I should say it was a destroyer, and so is kainit. It will not have that effect in the soil.

Q. Why?

A. I suppose the material that is in it, the component parts, are dissolved and distributed, and it is plant food. It is lime and phosphoric acid, both of which are plant food.

Q. Before it gets into the soil?

A. Then it will destroy it.

Q. Have you frequently come in contact with diseases of plants?

A. Yes, fighting them all the time.

Q. Have you seen the various kinds of diseases affecting the plants?

A. Yes, all the common diseases.

Q. What are the various diseases that affect cotton?

A. Several; rust and blight. Rust and red-rust both affect it. We find a cheaper way than spraying it is using kainit as a germicide in the soil. We can destroy it by starting in time by Bordeaux Mixture, just as we do on potatoes and the tomato and fruit trees. We can destroy any fungus by the application of the Bordeaux Mixture if it is done before the fungus develops; after it develops the Bordeaux Mixture will not kill the fungus plant. You must understand, in speaking of fungus, there are two great divisions of
89 vegetable life; one the flowering plant, and one the flowerless plant, and the flowerless plant belongs to this fungus class. And there is a root rot that we have not yet been able to find a remedy for. The wilt we have not been able to fight except by planting these immune plants. They belong to the same class of diseases as blight in pears. The wilt in cotton destroys the plant by choking up the cells. It is a microscopic plant, you cannot see it with the naked eye and they multiply by the millions and fill up the cells of the plant and choke up the circulation. That is the way it kills the plant.

Q. Do you remember the name of that fung-us growth?

A. That is a bacterium, it is not a fungus, that circulates in the sap. A fungus does not circulate in the sap, it feeds on the sap of the host plant.

Q. What is the difference between fungus and bacteria?

A. Fungus manifests itself in the cells of the plant and on the outside of the plant. It is a larger growth; you can see it with the naked eye. The bacteria are extremely small plants, so small that they circulate in the sap of the plant, and in that way destroy it. We cannot reach them; we have been experimenting to find something to go in the sap to destroy them, but we have not found anything that will circulate in the sap and reach these bacteria. We cannot reach it from the outside, because it is on the inside of the tree.

Q. I want to know if acid phosphate can possibly create a germ, bacteria or fung-us growth—create a germ which infects a plant?

A. You cannot create spores or germs. These spores and the bacteria float in the atmosphere. They float in the atmosphere and we can collect a large number of them in a little while; they are all the time present floating in the atmosphere. They find a congenial nidus and they vegetate. The plant, whether brought by fertilizing or otherwise, into a condition favorable for the germination of these spores invite- their attack.

90 Q. What are the condition- of that?

A. Rapid growth. We know that plant lice do*es* not attack a vigorous, tender growth, but fungus does.

Q. I will ask you this question, would stable manure cause a plant to grow so that these spores or germs would attack it?

A. It develops some germs. Stable manure contains a great many germs itself—contains bacteria.

Q. I am speaking of its developing a condition of the plant favorable to these germs attacking it?

A. Yes.

Q. Would that be any fault of the stable manure?

A. No, anything else that would produce a tender succulent growth.

Q. Would that mean that the stable manure was harmful to crops?

A. It is harmful to some crops; we don't put stable manure on Irish potatoes.

Q. Would that be the fault of the stable manure or the use of it?

A. The fault of the spores that are in there already.

Q. I am speaking of the stable manure causing the plants to grow?

A. It has that effect.

Q. Does it cause a succulent growth?

A. If you apply much of it it will, with plenty of moisture.

Q. If you take stable manure and put it under cotton, will the stable manure create these spores or germs, or create the conditions of the plant by growth to invite the attack of these spores?

A. It would not create the germs or spores, but it might create a condition favorable to the growth of these spores. They require warmth and moisture and a tender nidus on which to germinate.

Q. Is there any fertilizer used to create a healthy growth of a plant—to create the body of the plant?

A. The proper combination of those three elements, nitrogen, potash and phosphoric acid, will create a healthy growth if you combine them properly.

Q. As to the fertilizer used in itself—in its composition in
91 making the growth of a plant, is there anything in itself which creates these germs?

A. No, sir.

Q. Is it possible for the fertilizer which was used on this crop to have created a fung-us growth?

A. No, sir; only through making a condition of the plant favorable for the reception of the spores.

Q. What is that condition?

A. A tender succulent growth and warm, moist atmosphere.

Cross-examination:

Q. The way that fertilizers and manures cause fung-us growth and rotting, if they cause that, is to put the plant in such condition as to invite them, and that is the result of two things, as I undersand it, the ingredients and the atmospheric conditions and the conditions of the land?

A. I don't admit that any fertilizer creates spores or germs.

Q. I don't understand you to admit that?

A. But a succulent, tender condition produced by certain fertilizers, together with the climatic conditions, are favorable to their growth and development; and you see more fung-us growth after a long, rainy spell, and warm spell, than after a dry spell.

Q. And the conditions, as I stated before, are the ingredients that are at the root of the plants, and the atmospheric conditions around the plants?

A. Yes, they affect the growth of the plant.

Q. They put the plant in such condition as to be affected by these growths?

A. Yes.

Q. The effect that was produced here—what about the boll weevil on this?

A. No insect there.

Q. That idea has been abandoned?

A. The boll weevil is active enough, but he has not been here yet.

Q. I believe when they had you here some several years ago that was a theory they were working on then, that it was a boll
92 weevil?

A. Yes, that theory was going about from the fact that they found some insect on the plant, and where this fungus started there was a little spot.

Q. Was it not the theory of the chemical company then, and was not their evidence largely directed to prove that it was a boll weevil?

A. I don't know, it was not my theory.

Q. Your statement was that it was partly insect and partly this fung-us growth?

A. I stated this, that possibly the bite or puncture of an insect had admitted the spores of the fungus, but you would finally find it was fung-us growth instead of an insect.

Q. To what weevil did you refer when you stated: "I don't think that is entirely attributable to insect work. There is evidence on the boll of the puncture of the weevil." What weevil was that you were referring to?

A. I did not know; I did not see any of them. I simply saw the boll; but I was satisfied afterwards that it was not a puncture, but simply the beginning work of the fung-us growth.

Q. At that time I was directing your attention to the fact that the defense that the chemical company was setting up was boll weevil, and that was the weevil that they were referring to?

A. No boll weevil has ever been in this State. If a wasp punctures the skin of a peach, or grape, or apple and breaks the natural protection, it will rot at once, because the spores from the atmosphere get in there.

Q. When you said there was evidence on the boll of the puncture of the weevil, what weevil were you referring to?

A. Some of them said they saw a sharpshooter. I had not seen any.

Q. That sharpshooter would not be called a weevil?

A. No.

Q. You were not speaking of a sharpshooter in speaking of the weevil?

A. No; I was not satisfied, because I did not much believe in the weevil.

Q. That was what they were endeavoring to prove then—
93 there was some evidence there of something like that, but you did not have much faith in the boll weevil?

A. I knew there was no boll weevil here.

Q. It was the Mexican boll weevil that you were testifying about?

A. I did not much believe there was any weevil about it; but said it bore the evidence of some puncture.

Q. I believe you were not here at the second trial of the case?

A. No.

Q. Did you send some one else, or did some one else come?

A. The botanist came, Professor Rolf.

Q. Were you called to Florence some years ago to look at some crops for Mr. Commander?

A. I was not called there for that purpose, but I looked at some.

Q. What kind of crops?

A. Cantaloupes.

Q. Whose cantaloupes were they?

A. I don't know.

Q. Whose land were they on?

A. I understood the cantaloupes were planted by Mr. Jones.

Q. Who took you to see them?

A. I think Mr. Commander took me.

Q. This gentleman here?

A. No, sir; I do not think it was; I think it was an older looking man that that.

Q. He has probably shaved off his mustache?

A. Possibly that is what did the business.

Q. Did you see there the difference between those patches of cantaloupes growing right side by side?

A. I saw the difference between the two fertilizers, the one that had potash and the one that did not. You will find that was some disease of the cantaloupes where potash was not used.

Q. One was manufactured by the Virginia-Carolina Chemical Company and one by Wilcox, Gibbes & Co.?

A. Yes.

Q. Isn't that the McMurphy fertilizer?

A. I do not know.

Q. One was wilted, burnt up, and the other was not?

A. Yes, that was what did it; a sin of omission rather than one of commission.

94 Q. The sin of not putting on potash?

A. I pursued that investigation afterwards, and found where the kainit was used my cantaloupes had nothing of that wilt on it.

Q. The Virginia-Carolina Chemical fertilizer right by the side of the McMurphy fertilizer, and you found the Virginia-Carolina Chemical fertilizer failed to produce the results; and your opinion is it was because there was not enough potash?

A. Yes.

Q. Did you account for it to Mr. Commander?

A. I do not think I did. I expect I suggested that was the difficulty. I do not know positively, of course; just looking at it I could not know positively what the trouble was; I found out afterwards that that was the trouble.

Q. Wasn't that the question, the very question which they had you there for, to find out what was the matter with the fertilizer, because it was a question arising between them and the company?

A. Yes; he told me his idea was just like this, that the fertilizer had poisoned the plant.

Q. You testified that the effect on the plant was the result of something about the fertilizer—a defect in the fertilizer?

A. It was because that plant did not have enough potash; that was my idea at that time, and I became satisfied afterwards that that was the trouble.

Redirect examination:

Defendant offers to introduce the testimony of Professor Rolf, which was delivered at a former trial.

Plaintiff objects on the ground that Professor Rolf is alive, and that it is entirely possible for him to have been here, and that this does not come under one of the accepted classes.

Objection overruled. Exception noted.

The testimony of Professor Rolf is read to the jury.

94*a* Professor P. H. ROLF testified:

Direct examination:

Q. Professor, what is your occupation?

A. Botanist and bacteriologist at the South Carolina Experiment Station, located at Clemson College.

Q. Give us your experience in that line. But first, how long have you been there?

A. I went to that position a year ago the first of last August.

Q. What has been your experience in that department?

A. I have been working in that for about twelve years now. That is, in the line of plant diseases—plant diseases being my especial line of work.

Q. What experience have you had in other colleges before you came to Clemson?

A. My first position was with the Experiment Station in Iowa under the Secretary of Agriculture as director. After that I transferred about ten years ago to Florida and worked there under several directors studying plant diseases mainly, as botanist of the Florida Experimental Station.

Q. When was your attention first called to this question of damage to the boll of cotton?

A. Do you refer to the damage in South Carolina or as a whole?

Q. As a whole.

A. In '90 was the first time and in '93 was the second time my attention was directed to it.

Q. When was your attention first called to it in South Carolina?

A. About the first or middle of September a year ago.

Q. What steps did you take, if any, to investigate after you heard of it in South Carolina?

A. The evidence brought out in court signified that there was a very wide-spread and dangerous disease to the cotton crop in South Carolina. So by the instruction of the Director of the Ex-
94*b* periment Station the entomologist and myself were detailed to look into this matter and see what the trouble was and to

devise means, if possible, to abate the evil. So we were sent to the different points where the trouble was said to be located, and to investigate the cause of the trouble. The bacteriologist, or botanist, and the entomologist were detailed together that they might look into the trouble as definitely and as quickly as possible, that we might confer in the field; so that we need not make any duplication or lose any time. I believe our first visit was to Florence, where we studied a field somewhat. Then we came to Darlington, and from Darlington to Bennettsville. After studying the disease at Bennettsville I went to a place southeast of Columbia,I think it is Batesburg, to investigate the disease there.

Q. Proceed now and tell us in detail what investigations you made, without my asking you any questions, and what conclusions you came to. If you have had occasion to look into this question elsewhere prior to this damage in South Carolina, you can give us your experience.

A. I should possibly state that before I state as to my work in South Carolina. Of course, it is the duty of a plant pathologist, as well as a human pathologist—(Interrupted).

Defendant objects to any testimony as to conditions in other States.

By the COURT: I think that anything that throws light on the history of the cotton plant and its diseases when coupled with this is competent.

Defendant excepts.

Q. You may proceed, professor.

A. As one who was engaged in this as a profession, I naturally kept myself informed as to what was going on. Consequently when the disease of the cotton was reported by scientists in 1890 it came promptly to my attention. I looked into the matter from time to time as I had occasion to visit sections where cotton fields were located. I watched it, looked out for the disease, to see whether the disease was present. When the second disease of the cotton
94c boll was reported from another section of the South it was in 1893. This was reported from the botanist of the Alabama Experimental Station, Dr. Steadman, now in Missouri. He reported a disease caused by bacteria. The disease was reported and accurately described so that any one who was a scientist and engaged in this line of work might recognize the disease if discovered. Following the information, I saw very little of the disease that was reported at that time until coming to South Carolina a year ago, when I became more actively engaged in this line of work, as the disease was not so prevalent in the parts of Florida where my previous work was mainly located. Coming to the fields of South Carolina, we examined the bolls, looked into them and talked the matter over, and then preserved our material, both in the natural state and in preservatives. We carried the bolls to the college with us that we might there study the organism, and separate the organisms (if any should be present) from the diseased bolls. After arriving at the college both the entomologist and myself went into the work quite actively, and as the result of the investigation we found in those bolls that were

collected at various stations, from Florence, Darlington, Bennettsville and Batesburg, that there were two diseases present, one caused by a fungus and another by bacteria. Oftentimes these diseases occurred in the same fields; so that it became of prime importance for us to notice especially the conditions, the superficial conditions, that we might be able to tell how they might be recognized without the use of the microscope and costly instruments and a laboratory. The investigations were carried forward. We found the two diseases present, but did not find what we expected to find, that is, the Mexican boll weevil. I believe that is all I wish to state at this point.

Q. Could these two diseases you have mentioned have been produced by fertilizers?

A. No, sir. If one question in science is more firmly established than any other, it is that no living organism can be produced from dead matter. In other words, we have two kingdoms; and we
94*d* can no more produce, raise up, a bacterium without a previous germ than we can produce an elephant. A scientist has said: "Tell me how to make an atom and I will tell you how to produce a world." And the biologist says: "Tell me how to produce a bacterium and I will tell you how to make an elephant." So far as we know there is only one thing in the universe, and that is God himself, who can create the life principle in inanimate matter.

Q. Is that organism the cause or the result of that disease?

A. It is the direct cause. If the organisms were not present, or some organisms were not present, the cotton boll could not rot. In other words, if we should take the cotton boll and place it under such a condition that no organism were present it would remain sound indefinitely, it would remain years without rotting.

Q. (Counsel hands to witness boxes containing cotton bolls.) Take these boxes indiscriminately and let us know what the diseases are and the cause of the rot of those bolls?

A. You have here three bolls. In two of these bolls the disease was caused by bacteria, and in one boll it was caused by fungus.

Q. Step down to the jury and explain how you detect it?

A. You will notice (explaining to the jury) here is a boll which opens in a rather peculiar way. You will notice that this boll opens in a very different way. Now, it is only by the aid of good instruments that you can make out the cause for this, but by comparing them repeatedly the scientist is enabled to say that one is caused by bacteria and the other by mould or fungus. You have here another one. You will notice this same peculiarity. You will notice it in the field, but it is very difficult to see without having experience in that matter. Here is a box where the bolls were placed in a little too green, or the box may have been closed before the bolls dried out. In them, though, the fungus had a chance to develop, and we have no difficulty in finding the fungus there.

94*e* Q. What is the appearance of the fungus?

A. You see a reddish appearance. Now, you might confuse that with that whitish substance. That whitish substance never occurs until after the boll is dead. But this reddish appearance is

disease and is produced by the spores of the fungus. The spores are very minute, only about the size of a blood corpuscle.

Q. Take this box.

A. Here we have one that seems to be affected by bacteria, but the others I wouldn't say definitely as to what the cause was there. It may be one or both of the troubles present.

Q. The first box of samples testified to was from the field of W. S. Hatchel; the second from the field of P. P. Chambers; and the third from the field of W. A. Law; now, this is J. P. Kirven's.

A. In that we seem to have one that is entirely due to bacterial rot. The others have been so covered over with mould that I would not like to give an opinion as to those. The subsequent treatment has been too rough on them to allow any one to identify the disease definitely.

Q. Now, here is a box without a name which Mr. McCullough thinks came from Mr. Coit Wilson's.

A. We have here a specimen that was affected with bacterial rot in a slight degree on the boll. You will notice that the cotton boll had almost opened, yet this had a slight decoloration, and the peculiarity of the boll helps one to identify that. In the case of these others the subsequent treatment had been so bad that one would be hardly able to venture an opinion on them.

Q. That this box?

A. I see none there but what is caused by a fung-us growth. I looked that over, but I see nothing but what was caused by a fung-us disease.

Q. Look at these cotton stalks. (Witness does so.)

A. So far as I have examined every boll that I can tell definitely (and there seems to be only one that I cannot tell definitely) is diseased with the bacterium. There is no fung-us growth present on this pile of stalks.

Q. You say that this cotton, then, with the exception of one
94f boll—and of one boll only you cannot speak definitely—is injured by the bacterium?

A. Yes, sir; bacterial disease.

Q. Is the bacteria an organism?

A. Yes, it belongs to the lowest in the scale of plant life. It is the cause of some thirty or forty plant diseases, and, as the jury know, the cause of many diseases in the human species. It belongs to that class of organisms commonly spoken of as microbes.

Q. Scientifically how do these diseases begin and affect the plant life?

A. The bacterium finds its way to the plant and there lives upon the plant tissues. Possibly I had better preface that. In regard to bacteria, they usually speak of bacteria in the sense of disease-producing and destroying organisms; but there are only a few of that nature. Of the number of bacteria, reaching up to about twelve hundred species, there are comparatively only a few out of that number that cause disease either of man, animals or plants. Now, they cause disease in various ways. In the case of the cotton plant it produces disease by using up the material that the plant has brought

together. This particular organism delights in stealing the plant food or material that the plant has elaborated for its own use. The plant places most of this elaborated material in the cotton boll, because that is the place its offspring is to be located, or is already located. The bacterium gains entrance to this food repository and lives upon that food. You will see that there is a warfare: first, the plant trying to protect its offspring by placing it and its food within a boll, and the bacterium trying to gain entrance there. Sometimes the cotton plant succeeds in protecting its young and sometimes the bacteria succeeds in getting at the food store.

Q. You have stated that this organism is the cause of that disease?

A. I would say that was my opinion without having examined those particular bolls. I should say unhesitatingly that that was the cause of it, but at the same time I could speak more positively had I examined the organisms microscopically in those particular bolls.

949 Q. You detected the disease from those bolls?

A. Yes.

Q. That organism cannot be produced by any fertilizing agency?

A. No, sir; that would be a botanical miracle.

Q. What do you say about the probability or improbability of finding bugs or insects of any description in that cotton; if so, at what period, and the cause of it?

A. In our examination we found in a great majority of cases that the insects were present after the bolls had decayed to some extent. The bolls had shown the signs of disease. By decay I mean the signs of fungus on the boll. Possibly I have omitted one point and that is that the earliest appearance to the naked eye of a diseased cotton boll is a slight tinge of yellow within the receptacle itself. That is long before you can see from the outside that anything is wrong with the boll. If you cut it across and there find a yellow spot, and if you will take that and put it under a microscope you will find that it contains myriads of these bacteria that have been described by Professor Steadman as the cause of the boll rot in Alabama. The first indications on the outside is a slight shrinking of the boll. In the case of the fungus disease it is different. In that case the indications are on the outside, and it works inward; though to a casual observer the two diseases are indistinguishable.

Q. As to the worms in the boll, when do they appear?

A. They appear at a later period and are what we know as saprophytic insects. These insects do not live upon the healthy bolls. In other words, they are so organized and constituted that these decaying organisms must prepare the healthy boll for them first by rotting it. We all know how certain insects live in rotten logs. We never find them in healthy logs. So we find that these insects live in rotten cotton bolls, and never attack live cotton bolls.

Q. Therefore the insect that you found in here was the result and not the cause of the rot?

A. In all cases the insects that we found in South Carolina were the result of the rot and not the cause of it.

94*h* Cross-examination:

Q. What is your age?
A. Thirty-five.
Q. You studied first in Iowa?
A. Yes, sir.
Q. You were not conversant with the cotton plant until you came South?
A. Oh, yes.
Q. How many years have you been conversant with it?
A. Since 1890.
Q. You began the study in Iowa?
A. Yes, sir.
Q. Where were you raised?
A. In Iowa.
Q. Now, this bacterium you speak of, as I understand you, lives on certain plant food that is secreted and concentrated more largely in the cotton boll than elsewhere?
A. So far as we know. You will understand that we do not know everything about the bacteria-flora of the South; but as far as we know the only place we discover this bacteria is in the cotton boll.
Q. That is due to the fact that there is concentrated there a larger amount of the particular food which the bacterium seeks?
A. So far as we know.
Q. The more of that that is concentrated there the more likely they will be to attack it if they are present at all?
A. Well, I do not quite see the import of your question.
Q. I mean that is the inducing cause; that is what induces the bacterium, the presence of that upon which it feeds?
A. Not scientifically.
Q. If that food were not there, would you find the bacterium at all?
A. No, sir, I think not.
Q. In the absence of food there would not likely be any bacterium?
A. No, sir, not likely, so far as we know.
Q. It is not the Mexican cotton boll weevil?
A. No, sir, I think not.
Q. So scientific matters are matters on which a great many people have difference of opinion. Were you present at the former trial of this case?
A. No, sir.

94*i* Q. Is Professor Newman a professor of agriculture at Clemson College?
A. Yes, sir.
Q. If it was his opinion that this was the cotton boll weevil as firmly as it is yours that it is a bacterium, one or the other would be mistaken?
A. Was it his opinion? Is it a fact? Do you state a fact?

(It is agreed to by the counsel on both sides that the testimony of

Professor Newman, delivered at the former trial of this cause, shall be admitted as a part of the testimony in this case.)

[Seal Supreme Court of South Carolina. Nil Ultra.]

A true copy.

U. R. BROOKS,
Clerk Supreme Court of S. C.

Mr. STEVENSON: Do I understand that the Court allows the testimony of Professor Rolf, in regard to cotton bolls that were
95 not produced in the year 1898 from the fields of Kirven?

The COURT: Unless it was shown that those bolls that witness was talking about came out of Kirven's field in the year 1898, the testimony is not relevant.

Transcript of record from the United States Circuit Court, J. P. Kirven *vs.* Virginia-Carolina Chemical Company introduced, and marked Exhibit "A."

Reply.

J. P. KIRVEN recalled:

Direct examination:

Q. What is that you have?
A. Guano sacks.
Q. What guano?
A. Guano I bought from S. M. McCall.
Q. In the year 1898?
A. Yes, sir.

Plaintiff introduces three sacks which witness testified had contained fertilizer bought by him from the defendant in 1898.

Q. Which is the dissolved bone?
A. These two (indicating).
Q. And one the National Tobacco Fertilizer?
A. Yes, sir.
Q. Two dissolved bone, one a 13 per cent. and one a 10 per cent.?
A. No, sir.
Q. Just read what is on those sacks?
A. Two hundred Pounds of Standard Bone. Dissolved South Carolina Bone and the analysis. The brand down here is Virginia-Carolina Chemical Company, S. W. Travers' Company branch, Richmond, Va.
Q. Have they all the same mark?
A. Yes.
Q. Marked as being the Travers & Co. branch goods?
A. Yes; shipped from Richmond, Va.
Q. Are those sacks the sacks containing that shipment of 1898 that we are speaking about, and that this litigation is about?
A. Yes.

96 Cross-examination:

Q. What is the condition of those sacks?

A. They have been preserved because I had them washed.

Q. Where was that fertilizer shipped from?

A. I could not tell you.

Q. Don't you know that it was shipped from Charleston, S. C.?

A. I don't know it of my own knowledge. I never knew where the guano came from, and I had no idea where it came from until I was sued by the Virginia-Carolina Chemical Company in the fall of '98. I thought I bought it from S. M. McCall, and I made my note to him, and also made my paper to S. M. McCall.

Q. When was the first time you found you bought it from the Virginia-Carolina Chemical Company?

A. In the fall of '98. I could not tell you the exact date; somewhere in the fall—about the 1st of November.

Q. That was the first you knew of it?

A. Yes; that was the first I knew of the Virginia-Carolina Chemical Company in the matter; and I did not know anything about the Berkeley Company until I went to the railroad *sa*tion——

Q. What did you learn from the railroad station that you are about to tell when my friend interrupted you?

A. I went to the agent to find out.

Q. What did you mean to say about the Berkeley?

A. I heard the Berkeley shipped it; that it was shipped from the Berkeley Company.

Q. You heard it when you went to the station?

A. Yes.

Q. That the Berkeley shipped it?

A. Yes, I heard it.

Q. When you went to the railroad station?

A. Yes.

Q. You heard it in the first trial?

A. Yes.

Q. Then you heard it in the second trial?

A. Yes.

Q. Then you heard it in the third trial in the United States Court?

A. I don't remember whether I did or not.

Q. Do you deny hearing it there?

A. I do not remember whether it was mentioned there.

97 Q. You heard that it was manufactured by the Berkeley Company and shipped from Charleston, and that they put it in S. W. Travers' sacks?

Objected to by the defendant unless it be permitted them to show what was said about its being the S. W. Travers' sacks, and the relations that existed between the Travers Company and the defendant company brought out on the former trial.

A portion of page 57 of the record of the trial of '99 was read.

Q. Did you hear Mr. Fuller say this in the former trial: "The goods were shipped from the Berkeley Mills?"

A. Yes; I think I heard him say that.

Q. And this: "What has S. W. Travers got to do with the Berkeley Mills?" "A. They are also one of the branches of the factory at Richmond." "Q. Does Travers ship to Berkeley and Berkeley ship out from there to customers?" "A. No, sir." "Q. How did it happen that Travers' goods comes from Charleston and Travers is in Richmond?" "A. I don't know that I can state that from my own positive knowledge." "Q. I thought you were superintendent of the shipping department?" "A. Yes."

Q. By your testimony with those sacks, are you trying to create the impression at this late day before this jury that it was not shipped from Charleston?

Objected to.

The COURT: I think it is competent for him to state what his purpose is. He is not to state what inference the jury may draw from it; that is a matter for the jury to consider for themselves, but it is competent for him to answer that question.

Q. Answer the question, Mr. Kirven. The question is, what was your purpose in introducing those sacks, was it to contend that the fertilizers were shipped from Travers in Richmond and not from the Berkeley?

98 A. My purpose is to throw all the light on my case that is possible, to show the analysis and to throw all the light on this case that I can.

Q. You don't answer that other question?

A. That is my purpose. You asked me what is my purpose.

Q. Is that all of your purpose?

A. My purpose is to throw all the light I can on my case and to try and get justice in this case.

Q. Is it your purpose in introducing those sacks to contend thereby that the fertilizer was shipped from Richmond and not from the Berkeley at Charleston?

A. That is for the jury to decide for themselves. I put the evidence clear and plain, and that is my purpose to make my case as clear to this jury as I possibly can do.

Q. It was ruled that I had a right to ask you the question, if it was your purpose to contend, by the introduction of those sacks, that that fertilizer was shipped from Richmond and not from the Berkeley in Charleston?

A. I don't know where it was shipped from; it was all the evidence I ever had.

Q. Was that your purpose in introducing those sacks?

A. I could not tell you anything about that. I am after throwing all the light I possibly can on my case.

Redirect examination:

Q. Did you have any other evidence as to analysis except the evidence on those sacks?

A. Nothing else except a little book that represented the analysis of this brand.

Q. Do you remember what analysis was introduced by the Virginia-Carolina Chemical Company in the trial of this issue before?

A. I remember some of it.

Plaintiff introduces analysis which the Virginia-Carolina Chemical Company offered in evidence at a former trial of this case, found on pages from 93 to 97 in the record of 1901.

99 M. S. HAINSWORTH recalled:

Direct examination:

Q. I will now submit the question I submitted to you this morning as to what, in your opinion, would be the cause of the damage to the blighted cotton that you see here. Under the circumstances which I detailed to you this morning, that is, where you found it in the same field with only a row between one part of it, the blighted part having had acid, kainit and meal, and the perfect part having had only kainit and meal under it, and where you found that condition existing, wherever that particular form of acid was used in a wide territory there, and had not found it where that particular form of acid was not used, what would be your opinion as to what caused it?

Objected to on the ground that it is merely the opinion of a witness, and it has not been shown that this witness has such expert knowledge as would allow him to testify as an expert.

The COURT: I think I have indicated what would be my ruling this morning, that the opinion of the witness is no better than the opinion of the jury.

Exception noted.

Dr. J. M. EARLE recalled:

Direct examination:

Q. Did you hear the testimony this morning of Colonel Newman?

A. Yes, sir.

Q. What investigation of the effects of different substances on the plant have you made?

A. Only made some experiments this year from the central government, United States Government, some bacteriological investigation.

Q. What about the effect of sulphuric acid and other substances being found at the roots of plants? Colonel Newman testi-

100 fies that acid phosphate will be a poison to things out of the ground, but it would not be a poison to them in the ground; suppose you take sulphuric acid and put it in combination with pyrites of iron at the root of a plant, what would be the result?

A. Iron combined with two parts of sulphur, bi-sulphide of iron, or otherwise known as fool's gold, commonly called, or in its crude state iron pyrites, large quantities of which are imported from Sicily, would be acted upon slowly in the presence of dilute acid to any amount in the presence of air and moisture; it would become

decomposed slowly, and it would form copperas, as we commonly call it, which is otherwise known as sulphate of iron and analygous to bluestone, which is sulphate of copper. Sulphuric acid will be found also in small measure in some way unknown to the chemist so far and remain there, or be combined with organic matter and copperas be formed. Sulphuric acid in minute quantities is disastrous alike to animal and vegetable life; in minute quantities copperas is a poison to all vegetable life. So iron pyrites, in the presence of moisture in contact with water and a slight amount of mineral acid, will become decomposed—in fact, it will go on without the presence of any acid, it will decompose without the presence of any acid; the mere contact of any moisture and atmospheric air will suffice to its decomposition, and it will be poisonous to vegetable life. That will be a slow process. It will depend on how minutely divided the iron pyrites is. Of course, the more finely subdivided it is the more rapid the change.

Q. Would that likely show on the plant for a while after putting down the fertilizer, if any of that got in there?

A. Iron pyrites, as it stands, is harmless to anything in the world, and would not poison animal or vegetable life as it stands so.

Q. The result of the process as it goes on, will it take it some time for it to show?

101 A. It is obliged to take a certain length of time; how long, I do not know; it will depend on the minuteness of the subdivision of the particle of the iron bi-sulphite and the contact of the water and moisture and the relative proportions.

Q. It will depend on the moisture of the season how long it will be before it begins to show?

A. Yes.

R. C. COMMANDER recalled:

Direct examination:

Q. Were you present with Mr. Newman when he made an inspection of the crops down in the neighborhood of Florence that he spoke of this morning?

A. I was.

Q. Who procured him to go there?

A. I did, through the request of Mr. P. A. Willcox.

Q. Who was Mr. Willcox representing?

A. The fertilizer people, I suppose.

Q. The Virginia-Carolina Chemical Company?

A. Yes.

Q. Did you have photographs of those fields made?

Objected to as not in reply.

Objection sustained.

Exception noted.

Q. When you got Mr. Newman there to account for the strange condition of things, was he able to do it at the time?

Objected to as cumulative and not in reply.

The testimony closed here.

The defendant submitted motion that the Court direct a verdict for the defendant on the ground of *res adjudicata*.

Motion overruled.

Exception noted.

The following is a copy of the charge of the presiding Judge:

Charge of the Presiding Judge.

Mr. Foreman and Gentlemen of the Jury: This is an action brought by the plaintiff, J. P. Kirven, against the defendant, the Virginia-Carolina Chemical Company, in which the plaintiff
102 alleges that the defendant, under the circumstances set out here, through the medium of an agent, undertook to furnish the plaintiff with fertilizer adapted to a certain purpose for cotton and corn, and that the defendant did furnish the fertilizers, but that they were so manufactured, with such gross negligence and want of skill, that instead of being of advantage to the crops to which they were applied, that they destroyed the same in large part, and were not only worthless, but by destroying the crops, damaged him; and for the injury he has sustained, which he alleges amounts to the sum of $1,995, he brings his action.

The defendant answers that complaint first by denying all liability; that is what his denial amounts to. They admit that they furnished the fertilizer, but the denial amounts to a denial that the fertilizers were managed with any negligence or want of skill, or that they destroyed the crop of the plaintiff or injured him in the way which he alleges. Then, besides that, the defendant interposes another defense, by which he undertakes to say, and does say, that everything that is litigated in this action has already been determined by an action in another court which had jurisdiction of the subject matter and of the parties, and that the determination of that court is conclusive here, and is a bar to the plaintiff's prosecuting this action. Now, those are the issues set up here. The plaintiff claims damages because he alleges his crop was destroyed in large part by the use of fertilizers negligently and unskilfully manufactured by the defendants, whereas, the defendant has undertaken to furnish fertilizers that were skilfully and carefully manufactured for the purposes for which they were purchased; and the denial by the defendant of all that, and the special defense that this matter had already been adjudged in another court and that the parties are not at liberty to litigate it in this court.

The Court has already practically disposed of it, but counsel desire that it be put in such shape as if the court is mistaken; in
103 the view it takes now there will be the fullest investigation and determination of that issue by a court that has the power to review and correct the errors that this court might fall into; and they have, therefore, presented to this court here a request to charge you about that matter, and while the court has already practically ruled on it, yet I will, in order to complete the record, take that matter up and give you my opinion, which must control you as the law in

the case with reference to that matter. As the defendant has well said, and as I propose to charge you, the statute law of this State, which you have heard—the Code of Procedure—in one of its sections provides that "the answer of the defendant must contain: First. A general and specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Second. A statement of any new matter constituting a defense or counter-claim in ordinary and concise language without repetition." That is a section of the Code of Procedure.

The meaning of this provision is that if the defendant seeks to avail himself of any such matters as these, that is, of the denial of a fact, he must deny it in his answer; or, if he seeks in any particular action to avail himself of a special affirmative defense, he must set it up, or if he seeks in that action to avail himself of some claim he has against the plaintiff, he must set it up; he cannot have the benefit of any counter-claim on his part against the plaintiff in that action, so as to have it determined or given effect to by the court unless he sets it up and brings it in the action by setting it up in his answer. But that does not mean, and cannot have, and does not have the effect of shutting him off if he fails to set up a counter-claim in his answer in a particular action, shutting him off from ever asserting that claim against the other party. If he does set it up and it is adjudged against him, that shuts him off, but if he elects
104 not to bring it in the case, but leaves it aside to be prosecuted by him hereafter in some other suit or adjustment between the parties, or simply allowed it to go unadjusted, if he elects to do that, he has a right to do it; and so the court held today, and holds now, that the claim here for damages by the plaintiff against the Virginia-Carolina Chemical Company was not necessarily involved; it was, as a matter of fact, not set up in his answer in that suit in the Federal Court, and it was not imperative on him to set it up and it was not necessarily involved, and the fact that there has been a suit in the Federal Court, judgment in that court can have no effect whatever on your determination of the issue presented here now. So that the court refuses to charge you that the plaintiff here is estopped from suing this action by the judgment of the Federal Court in the other action, and that request of the defendant is refused.

Let us go back now to the suit between the plaintiff and defendant, which, so far as you are concerned, is absolutely untrammeled by anything that was done in the Federal Courts, just the same as if there had been no action brought between the parties in the Federal Court, and as if this was the first and only litigation between the parties. The plaintiff now claims that the defendant had injured him by its negligent and unskilful manufacture of fertilizers which it furnished to the plaintiff for the purpose of being applied to certain crops, and the defendant denies that, admitting that it furnished the fertilizer, but denies that they were unskilfully or negligently manufactured, and that they produced the injuries alleged. Those are questions you would have to determine from the testimony.

If you find that the fertilizer furnished here, furnished for a

certain purpose, that is, the purpose alleged in the complaint, it being used to fertilize a crop of corn and cotton, and that they were manufactured and furnished by the defendant with a special refer-
105 ence to being used by the plaintiff for that purpose, and that they were negligently and unskilfully manufactured by defendant so that they did not answer that purpose, but resulted in injury to the plaintiff by destroying his crop; if you are satisfied of those facts by the preponderance of the evidence, then the plaintiff is entitled to be compensated by the defendant for its negligent and unskilful manufacture of the fertilizers—to be compensated to such an extent as will be a just compensation to him for the negligent and unskilful conduct of the defendant in manufacturing that fertilizer and failure to furnish a fertilizer suitable for the fertilizing of the plaintiff's crop of corn and cotton.

He alleges here that his damage amounts to $1,995; if you find that he is entitled to recover damages at all, it would be for you to determine what amount he is entitled to recover; and you cannot exceed the amount that he claims, even though he has shown you, by the preponderance of the evidence, that he has suffered vastly greater damage than $1,995. If you find he is damaged and is entitled to be reimbursed for that damage in this action, and his damage did not amount to as much as $1,995, then you must determine what it did amount to and award him a verdict for the actual amount of damages that the testimony warrants. In estimating the amount of damages, if you conclude that he is entitled to damages in this suit, you will take into consideration as elements entering into it, the actual amount of loss that the plaintiff incurred on account of the alleged negligence and unskilfulness of the defendant. The elements of loss in that would be found from the rental value of the land, together with the costs of preparing the land and planting and cultivating the crop, and against that must be set off the value of whatever crop was raised—actually raised. Those are the elements of damages, the items that you are to consider in arriving at plaintiff's damages, if you conclude that he is entitled to dam-
106 ages. Of course, if you conclude that he is not entitled to damages, you will find the verdict for the defendant. The plaintiff must establish his case by the preponderance of the evidence; he must show, by the preponderance of the testimony, or the greater weight of the evidence, that he was injured, and that his injury was the result of what is stated here as the cause; that is the gross negligence and unskilfulness of the defendant resulting in the destruction in large measure of the plaintiff's crop. If he fails to establish that by the preponderance of the evidence, then he fails to make out his case and you must find a verdict for the defendant.

The defendant requests the court to charge you further, "That the jury cannot consider the question of there being a failure of consideration, but they can only find for the plaintiff, provided they find that the fertilizer poisoned the crop, and they cannot find that the fertilizer poisoned the crop except by the preponderance of the evidence." That word "poisoned," which is used here, is not used in the complaint, and the plaintiff does not claim that the defendant

poisoned the crop; he uses the word destroyed. A crop, or anything else, may be destroyed by poisoning, but that is not the only way in which it may be destroyed. It is not for me to tell you whether the crop was destroyed or injured; you must determine that by the testimony; but under that term of destroying the crop, the plaintiff does not allege that the crop was wholly destroyed, it was not consumed as if it had been burned by fire or rotted away or wholly destroyed, but it is alleged that it was destroyed in part, and the meaning of that term, "destroyed in part," is that either some agency contained in this fertilizer failed to develop and mature to the extent it would have done if that injurious or destroying element had not been contained in the fertilizer. It is not necessary that the crop was spoilt. If the crop was stimulated so that it developed—the plant developed
in one direction and not in all directions so as to be a perfect
107 plant, and if that one-sided or partial development was caused by some element contained in the fertilizer used and prevented the crop from maturing and making what it would have produced if that deleterious element had not been contained in the fertilizer, then that amounts to that extent to a destruction of the crop. Or if the plant was stimulated to growth, and yet was stimulated in such a way that it became more liable to attacks of disease, whether it be fungus or boll weevil or bacteria, than it would have been but for the deleterious element in the fertilizer, if that harmful element so negligently included in the fertilizer caused that development so that it was more liable to the attacks of disease than it would have been if the fertilizer had been carefully and skilfully manufactured; and for that reason it became more liable to disease or to the attack of its enemies and was so attacked and injured, that would amount to a partial destruction of the crop as alleged in the complaint.

So, as I said to you in the outset, it is not for the court to tell you whether the crop was injured or not, but you must say whether or not it is injured, and those are the illustrations of the way in which that word "destroyed" may be applied, and is to be understood and applied in this proceeding, either by poisoning the crop or in some other way injuring it so as to prevent its coming to maturity and perfect development, so as to produce what it would have produced if the poison, if there was poison, or other deleterious or injurious elements in the fertilizer had not been placed there. So that the proposition that the court is requested to charge you is defective to that extent; that the defendant does not depend on the poisoning of the crop, but the destruction of the crop in any way as has been indicated to you, or in any other way that may legitimately come within the meaning of "destroy." It is not a question of failure of consideration, but the question is the amount of damage caused by
108 the unskilful and negligent manufacture of fertilizer including something harmful to the crop, and resulting in the partial destruction of the crop. That is the question for you to determine. And so it remains for you to determine from the testimony whether the plaintiff has established his claim here or not. If you find that he has, then award him a verdict for whatever damages you

find from the testimony that he is entitled to, not exceeding what he complains in his complaint.

If you find he has not established his claim you will find for the defendant.

Your verdict will be either we find for the plaintiff so many dollars, and whatever you find. If you find for him, write the amount in words and not in figures. If you find a verdict for the defendant, say we find for the defendant.

The jury found a verdict for the plaintiff in the sum of $1,995.00. A motion for a new trial was made on the minutes of the court on the grounds hereinafter set forth in the exceptions. It appears, however, that in the motion to direct a verdict on the ground of *res adjudicata*, and on the motion for new trial on the ground of failure to sustain the plea of *res adjudicata*, the same were made generally without contending it violated Article IV, Section 1, of the Constitution of the United States.

This motion for a new trial was refused by the presiding Judge without formal order. Judgment was duly entered upon said verdict, and within due time notice of appeal to the Supreme Court of the State of South Carolina was given.

Exceptions.

(1) His Honor, it is respectfully submitted, erred in not directing, on motion of defendant, a verdict for the defendant, on the ground that the certified record of the judgment of the United States Circuit Court for the District of South Carolina, in which Virginia-Carolina Chemical Company was plaintiff, and J. P. Kirven was de-
169 fendant, rendered on the 4th day of April, 1905, and filed as a judgment in the office of the Clerk of Court of Common Pleas for Darlington County, State of South Carolina, on the 11th day of October, A. D. 1906, set up by way of supplemental answer and introduced by the defendant in evidence in this case showed an adjudication of all questions at issue between the parties in this cause, in that the action was between the same parties and involved the same issues which were raised or should and could have been raised under the scope of the pleadings in the cause in the United States Circuit Court above described;

(2) His Honor, it is respectfully submitted, erred in charging the jury as follows:

As the defendant has well said, and as I propose to charge you, the statute law of this State, which you have heard—the Code of Procedure—in one of its sections provides that "the answer of the defendant must contain: (First). A general and specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (Second). A statement of any new matter constituting a defense or counter-claim in ordinary and concise language without repetition." That is a section of the Code of Procedure.

The meaning of this provision is that if the defendant seeks to avail himself of any such matters as these, that is, of the denial of a fact, he must deny it in his answer; or if he seeks in any particular

action to avail himself of a special affirmative defense, he
110 must set it up; or if he seeks in that action to avail himself of some claim he has against the plaintiff, he must set it up; he cannot have the benefit of any counter-claim on his part against the plaintiff in that action, so as to have it determined or given effect to by the court unless he sets it up and brings it in the action by setting it up in his answer. But that does not mean, and cannot have and does not have the effect of shutting him off if he fails to set up a counter-claim in his answer in a particular action, shutting him off from ever asserting that claim against the other party. If he does set it up, and it is adjudged against him, that shuts him off, but if he elects not to bring it in the case, but leaves it aside to be prosecuted by him hereafter in some other suit or adjustment between the parties or simply allowed it to go unadjusted, if he elects to do that, he has a right to do it; and so the court held today, and holds now, that the claim here for damages by the plaintiff against the Virginia-Carolina Chemical Company was not necessarily involved; it was, as a matter of fact, not set up in his answer in that suit in the Federal Court, and it was not imperative on him to set it up, and it was not necessarily involved, and the fact that there has been a suit in the Federal Court, judgment in that court can have no effect whatever on your determination of the issue presented here now. So that the court refuses to charge you that the plaintiff here is estopped from suing this action by the judgment of the Federal Court in the other action, and that request of the defendant is refused.

Let us go back now to the suit between the plaintiff and defendant, which, so far as you are concerned, is absolutely untrammeled by anything that was done in the Federal Courts, just the same as if there had been no action brought between the parties in the Federal Court, and as if this was the first and only litigation between the parties.

In that he held that the section of the Code of Civil Procedure, set forth in said charge, did not require the defendant in said action in the United States Circuit Court to plead the matters of defense involved in this action; that it was optional to said defendant in said action in said United States Circuit Court to set up these matters in defense in the present action by way of a counter-claim, and
111 that if he did not do so he was not shut off by way of adjudication; and in further holding that he was not shut off from now setting up such matters by way of affirmative action, because he did not actually plead them by way of counter-claim in the action in the court referred to; and that these matters were not adjudicated against him, because he might have set them up and did not do so; in holding, further, that it was not imperative for the plaintiff to have set up these matters now sought to be set up affirmatively as a matter of defense in the action in the United States Court referred to;

And in that his Honor, the presiding Judge, erred in deciding against a title or right set up and claimed under an authority exercised under the United States, in that he failed and refused to give proper and full credit to the judgment of the United States, rendered in the case in the Circuit Court, and thereby denied to the defendant a right arising under the authority of the United States.

(3) His Honor, it is respectfully submitted, erred in his charge: "If you find that the fertilizer furnished here, furnished for a certain purpose, that is the purpose alleged in the complaint, it being used to fertilize a crop of corn and cotton, and that they were manufactured and furnished by the defendant with a special reference to being used by the plaintiff for that purpose, and that they
112 were negligently and unskilfully manufactured by defendant so that they did not answer that purpose, but resulted in injury to the plaintiff by destroying his crop, if you are satisfied of these facts by the preponderance of the evidence, then the plaintiff is entitled to be compensated by the defendant for its negligent and unskilful manufacture of the fertilizer, to be compensated to such an extent as will be a just compensation to him for the negligent and unskilful conduct of the defendant in manufacturing that fertilizer and failure to furnish a fertilizer suitable for the fertilizing of the plaintiff's crop of corn and cotton."

In that he applied as the test of negligence and unskilfulness in the manufacture of the fertilizer: the fact that it did not answer the purpose and expectation of plaintiff; the fact that it injured plaintiff's crop; the fact that the fertilizer might not have been suitable for the fertilization of plaintiff's crop of corn and cotton—whereas, the fertilizer might have been skilfully manufactured, yet it might not have answered the purpose for which plaintiff bought it, it might have injured his crop of corn and cotton, it might not have been suitable as a fertilizer for plaintiff's crop of corn and cotton—because all of these results may have arisen from an improper use by plaintiff of a properly manufactured fertilizer or by circumstances beyond defendant's control, so as to render an undeleterious ingredient thereof harmful, and because these tests, in effect, made defendant a guarantor of results and assumed the cause.

"But it is alleged that it was destroyed in part and the meaning of that term 'destroyed in part' is that either some agency contained in this fertilizer failed to develop and mature to the extent it would have done if that injurious or destroying element had not been contained in the fertilizer. It is not necessary that the crop was spoilt. If the crop was stimulated so that it developed—the plant developed in one direction and not in all directions so as to be a perfect plant, and if that one-sided or partial development was caused by some element contained in the fertilizer used and prevented the
113 crop from maturing and making what it would have produced if that deleterious element had not been contained in the fertilizer, then that amounts to that extent to a destruction of the crop. Or, if the plant was stimulated to grow, and yet was stimulated in such a way that *he* became more liable to attacks of disease, whether it be fungus or boll weevil, or bacteria than it would have been but for the deleterious element in the fertilizer, if that harmful element so negligently included in the fertilizer caused that development so that it was more liable to the attacks of disease than it would have been if the fertilizer had been carefully and skilfully manufactured, and for that reason it became more liable to disease or to the attack of its enemies, and was so attacked and injured that would amount to a partial destruction of the crop, as alleged in the complaint.

"So, as I said to you in the outset, it is not for the Court to tell you whether the crop was injured or not, but you must say whether or not it is injured, and those are the illustrations of the way in which that word 'destroyed' may be applied, and is to be understood and applied in this proceeding, either by poisoning the crop or in some other way injuring it so as to prevent its coming to maturity and perfect development, so as to produce what it would have produced if the poison, if there was poison, or other deleterious or injurious elements in the fertilizer had not been placed there. So that the proposition that the Court is requested to charge you is defective to that extent; that the defendant does not depend on the poisoning of the crop, but the destruction of the crop in any way, as has been indicated to you, or in any other way that may legitimately come within the meaning of 'destroy.'"

In that he applied as a test of negligence and unskilfulness in the manufacture of the fertilizer; the fact that some agency contained in it failed to develop and mature (the crop) to the extent that it would have had the injurious or deterring element not been contained in the fertilizer; the fact that by such an element the plant was stimulated so that it developed the plant in one direction and not another, so as not to be a perfect plant; the fact that such an
114 element might have prevented the crop from maturing—because all of these results may have arisen from an ingredient in the fertilizer properly there yet harmful; that its growth was stimulated so that it made it liable to disease, fungus or bugs, because improperly used by plaintiff, or may have arisen from natural conditions beyond defendant's control, and because these tests, in effect, made defendant a guarantor of results and assumed the cause.

His Honor having charged as follows:

(4) "The plaintiff now claims that the defendant had injured him by its negligent and unskilful manufacture of fertilizers which it furnished to the plaintiff for the purpose of being applied to certain crops, and the defendant denies that, admitting that it furnished the fertilizers, but denies that they were unskilfully or negligently manufactured, and that they produced the injuries alleged. Those are questions you would have to determine from the testimony."

"The plaintiff must establish his case by the preponderance of the evidence; he must show, by the preponderance of the testimony, or the greater weight of the evidence, that he was injured, and that his injury was the result of what is stated here as the cause; that is, the gross negligence and unskilfulness of the defendan[illegible]sulting in the destruction in large measure of the plaintiff's crop[illegible]f he fails to establish that by the preponderance of the evidence, then he fails to make out his case, and you must find a verdict for the defendant."

"It is not a question of failure of consideration, but the question is the amount of damage caused by the unskilful and negligent manufacture of the fertilizer including something harmful to the crop and resulting in the partial destruction of the crop. That is the question for you to determine."

It was error, it is respectfully submitted, not to have granted a

new trial on the motion of the defendant made on the following grounds:

(*a*) Because there was no proof that the fertilizer sold by
115 the defendant to the plaintiff was unskilfully manufactured, and so unskilfully manufactured as to injure the crops to which it was applied.

(*b*) Because there was no proof whatever by the plaintiff of the cause of the alleged injury to the crop, the plaintiff relying solely upon illogical inference *post hoc ergo propter hoc*.

(*c*) Because, in the absence of any proof whatever on the part of the plaintiff that the fertilizer damaged the crop, the defendant proved conclusively the ingredients of the fertilizer, and that the same could not possibly have violated nature and produced the disease that injured the crop, which was the effect of a living germ, bacteria or vegetable spore, that could not have been created or produced by the fertilizer.

(*d*) Because there is neither an expressed nor implied warranty on the part of the fertilizer company that its fertilizer will produce certain results, and the company is not liable for the failure of the fertilizer to produce such results. The liability of the company is limited to any damage that it may cause by the manufacture and sale of a fertilizer that does not contain the ingredients named in the analysis appearing on the sack, or that does contain injurious substances not shown by said analysis, of which there is no evidence in this case. If the purchaser, with full knowledge that the fertilizer contains the ingredients shown by the analysis, applies the same to his crop and injury results therefrom, even then the seller is not liable for the same, because it does not guarantee that the formula used will not produce bad results under any conditions.

(*e*) Because the formula used in the manufacture of the fertilizer was shown by the analysis on the bags, and was proved by testimony in the case without contradiction, and there is no evidence to show that it contained ingredients other than those proved by the defendant.

116 We propose the above as the Case, and when printed, the return to be filed as required, for appeal to the Supreme Court.

WILLCOX & WILLCOX,
W. F. DARGAN,
DARGAN & COGGESHALL,
Defendant-Appellant's Attorneys.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

117 EXHIBIT A.

Complaint.

Filed April 11, 1903.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Created by and Existing under the Laws of the State of New Jersey, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

The plaintiff above named complaining of the defendant herein alleges and shows as follows:

1. That the plaintiff Virginia-Carolina Chemical Company is now and was at the times hereinafter mentioned, a corpora-
118 tion created by and existing under the laws of the State of New Jersey, and is a citizen of the State of New Jersey.

2. That the defendant J. P. Kirven is a resident and a citizen of the State of South Carolina.

3. That on March 14th, 1898, at Darlington, the said J. P. Kirven made his certain promissory note in writing dated said day, wherein and whereby he promised to pay on October 25th next after date thereof to the order of S. M. McCall, two thousand, two hundred and ninety-eight dollars, at any bank in Darlington, S. C., for value received.

4. That although the said S. M. McCall was in said note named as payee, yet the said note was given to and received by said S. M. McCall solely as agent for this plaintiff to whom the same belonged and said S. M. McCall never had any beneficial interest in said note, but the beneficial owner was when it was made and still is this plaintiff, all of which was known at the time to the defendant.

5. That the said note was presented at maturity for payment and payment thereof declined, and no part of said note or interest thereon has ever been paid, and that there is now due and owing to Virginia-Carolina Chemical Co., on said note the sum of two thousand, two hundred and ninety-eight dollars with interest from the 25th of October, 1898.

6. That since the making and execution of said note the same has been lost or destroyed.

Wherefore, plaintiff prays judgment against defendant for the sum of two thousand, two hundred and ninety-eight dollars with interest from the 25th day of October, 1898, together with the costs of this action.

MITCHELL & SMITH,
WILLCOX & WILLCOX,
Plaintiff's Attorneys.

119 *Summons.*

Filed April 11, 1903.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation under the Laws of the State of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

To J. P. Kirven, Defendant in this Action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscribers at *the* their office, No. 31 Broad St., Charleston, S. C., on or before the Rule day, occurring twenty day- next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, S. C., the eleventh day of April, Anno Domini, one thousand, nine hundred and three, and in the 127th year of the Sovereignty and Independence of the United States of America.

MITCHELL & SMITH,
WILLCOX & WILLCOX,
Plaintiff's Attorneys.

C. J. MURPHY,
[SEAL.] *C. C. C. U. S., Dist. S. C.*

Marshal's Return of Service.

UNITED STATES OF AMERICA,
District of South Carolina, ss:

I hereby certify and return that I served the annexed summons and complaint on the therein-named J. P. Kirven by handing to and leaving a true and correct copy thereof with him personally at 7 miles from Darlington, C. H., in said district on the 17th day of April, A. D., 1903.

J. DUNCAN ADAMS,
U. S. Marshal.
By GRADY W. LAWSON, *Deputy.*

120 *Supplemental Answer.*

Filed March 6, 1905.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Created by and Existing under the Laws of the State of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

Now comes the defendant, J. P. Kirven, and by leave of the court first had and obtained, files this his supplemental answer in this case, hereby withdrawing any former answer heretofore filed by him herein.

I.

He denies each and every allegations in each and every paragraph of the said complaint contained, except as the same may be hereinafter admitted.

II.

On information and belief he admits the allegations contained in the first paragraph of the complaint.

III.

He admits the allegations contained in the second paragraph of the said complaint.

IV.

Further answering this defendant alleges that is any note was given by him to S. M. McCall, which, however, this defendant does not admit, the same was given in payment for certain fertilizers purchased by defendant from the said McCall. That the fertilizers so sold by the said McCall to defendant were the property of the said McCall, purchased by him from manufacturers at the date of said purchase unknown to the defendant; and upon information and belief this defendant alleges that the note so sued upon, if ever given by the defendant, was the property of the said McCall, and was, after the date thereof, endorsed and assigned to the plaintiff for value by the said S. M. McCall. That the said S. M. McCall and defendant were, at the time of the making of the said alleged contract, and at the time of the alleged execution and delivery of the said note, and at the time of the assignment and endorsement of the same
121 by the said S. M. McCall to the plaintiff, and at the time of the commencement of this action, and are now, residents and

citizens of the State of South Carolina, and therefore this court is utterly without jurisdiction in this action.

V.

Further answering and for a further defense this defendant alleges that the plaintiff is a foreign corporation created by and existing under the laws of the State of New Jersey at the date when the alleged note was taken and the alleged sale of fertilizers was made. That is was actively engaged at the said times in the manufacturing and selling of fertilizers, some of which, as this defendant is informed, were sold by the said plaintiff to the said S. M. McCall. That the said plaintiff was systematically carrying on the said business of manufacturing and selling fertilizers within the said State prior to the said 14th day of March, A. D., 1898, and that at that time and prior and for some time subsequent thereto the said plaintiff had not complied with the laws then existing prescribing the methods and conditions under which foreign corporations are authorized to do business in the State of South Carolina, which said laws then in force are now contained and compiled and will be found in Chapter 44, Volume 1, of the Civil Code of South Carolina, being the revision of 1902, in this that the plaintiff had failed to file in the office of the secretary of State a written stipulation and declaration designating some place within the State as its principal place of business, or locality at which all papers might be served on said corporation, and to file in the office of the secretary of State copies of its charter and by-laws with amendments of the same, or to comply with any of the other provisions of law expressly required by the statutes of the State of South Carolina as then in force and as now set out in the said Chapter and Volume of the Code of Laws of the State of South Carolina, all of which were prerequisite to the right of the plaintiff to do any lawful business in this State, and any and all business conducted by the said plaintiff during the above periods and prior to its compliance with the provisions of law referred to was unlawful, being prohibited by the statutes of this State, and said contract and note set up in the complaint herein are therefore null and void.

VI.

Further answering and for a further defense by way of counterclaim, this defendant alleges:

122 I.

That this defendant is a resident and a citizen of the State of South Carolina.

II.

That the plaintiff, the Virginia-Carolina Chemical Company, is now and was at the times hereinafter mentioned, a corporation created by and existing under the laws of the State of New Jersey, and is a citizen of the State of New Jersey.

III.

That heretofore, to-wit: on or about the 1st day of December, A. D., 1898, the plaintiff attached and took into its possession in the city of Wilmington, in the State of North Carolina, seventy bales of short staple cotton, which has been held to be the property of this defendant, of the average weight of five hundred pounds per bale, and has appropriated the proceeds thereof to its own use, claiming the same as a credit upon the indebtedness alleged to be due by this defendant to the plaintiff, which, however, this defendant does not admit, and that the plaintiff has caused said cotton to be sold, and has applied and appropriated the proceeds to its own use and benefit.

IV.

That the said seventy bales of cotton weighing thirty-five thousand pounds (35,000) were reasonably worth the sum of seven cents per pound, making total value of the said cotton so seized and appropriated by the plaintiff to its own use the sum of twenty-four hundred and fifty dollars ($2,450.00).

Wherefore the defendant demands judgment against the said plaintiff in the sum of twenty-four hundred and fifty dollars ($2,450), with interest thereon at the rate of seven per cent. per annum from the 1st day of December, A. D., 1898, and for his costs in this action.

GEO. W. BROWN,
STEVENSON & MATHESON,
WOODS & MACFARLAN,
SMYTHE, LEE & FROST,
Def'ts Att'ys.

123 *Acceptance of Service.*

Due service of the within answer acknowledged this Mch. 2nd, 1905.

WILLCOX & WILLCOX,
Of Plaintiff's Att'ys.

Trial of Cause and Verdict.

At a stated term of the Circuit Court, begun and holden at Columbia, S. C., in the district aforesaid, on the 16th and 17th days of March, A. D., 1905, this case came up for trial before the following jury, which was selected organized and sworn, to-wit: F. W. Heyward, Foreman; Robert S. Bollinger, A. M. Harley, Sr., H. H. Dent, J. H. Mancke, Geo. B. Radcliffe, T. D. Murtishaw, H. E. Bruce, M. T. Willis, E. B. Martin, C. F. Holmes, C. H. Beard. The pleadings were read to the court and jury. The following witnesses were sworn and examined on behalf of plaintiff, to-wit: S. M. McCall, P. A. Willcox, C. S. McCullough.

On the close of the testimony on behalf of plaintiff, counsel for defendant made a motion for a non-suit. After hearing the motion and grounds thereof and argument of counsel for and in opposition to the motion, the court refused the motion.

The following witnesses were sworn and examined on behalf of defendant, to-wit: R. M. McCown, J. P. Kirven, the defendant. The following witnesses were sworn and examined in reply on behalf of plaintiff, to-wit: C. S. McCullough, recalled, S. M. McCall, recalled.

On the close of the testimony counsel for defendant moved the court to direct a verdict for the defendant. After hearing arguments of counsel for and in opposition to motion, the court refused to direct a verdict for the defendant.

After hearing arguments of counsel for the plaintiff and defendant, the court charged the jury and they retired and returned into court with the following verdict:

"We find for the plaintiff in the sum of nine hundred and eleven 07-100 dollars. ($911.07).

F. W. HEYWARD,
Foreman."

March 17, 1905.

Counsel for defendant gave notice of motion for a new trial.

124 *Grounds for Motion for New Trial.*

Filed July 5, 1905.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL CO., Plaintiff,
vs.
J. P. KIRVEN, Defendant.

And now comes the defendant J. P. Kirven and in pursuance of notice duly served, moves the court on its minutes to set aside the verdict and grant a new trial in this cause on the grounds following, to-wit:

1. Because it is respectfully submitted that his Honor the Presiding Judge erred in overruling the motion for a non-suit, and also the motion to direct a verdict in favor of the defendant, and also in refusing to charge the second request submitted by the defendant, inasmuch as the uncontradicted testimony showed that the plaintiff a foreign corporation, had failed to comply with the provisions of the Statute Law of the State of South Carolina allowing foreign corporations to do business within its boundaries, and, therefore, could not maintain this action, such failure constituting a bar to plaintiff's right to recover herein.

2. Because it is respectfully submitted that his Honor the Presiding Judge erred in refusing to allow the defendant to introduce as testimony in his behalf the original summons and verified complaint in the case of the Virginia-Carolina Chemical Company signed R. L. Dargan and Willcox & Willcox, plaintiff's attorneys, in the office of the clerk of the Court of Common Pleas for the County of Darlington, on 15th November, A. D., 1898, and served on the defendant on 16th November, A. D., 1898.

3. Because it is respectfully submitted that the verdict in this case was without testimony to support it, and in direct contravention to the undisputed testimony introduced in behalf of the plaintiff itself, and to the charge of his Honor the Presiding Judge.

4. Because it is respectfully submitted that his Honor the Presiding Judge erred in the fourth paragraph of the original charge delivered by him to the jury in this case, inasmuch as there
125 was no evidence whatever on which such charge could be based, and, therefore, it was hypothetical and tended to mislead the jury.

GEO. W. BROWN,
WOODS & MACFARLAN,
W. F. STEVENSON,
SMYTHE, LEE & FROST,
Defendant's Attorneys.

Opinion Refusing Motion for a New Trial.

Filed July 29, 1905.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

The main question considered on this motion for new trial, upon which I have heard extended argument, is whether McCall sold the fertilizers in his own right, taking a note for his own benefit, and thereafter assigned it for value to the Virginia-Carolina Chemical Company, or whether he sold the fertilizers as agent of the Chemical Company, taking a note in his own name for convenience. It depends upon the decision of this point whether this court has jurisdiction. I do not understand that there is any contention that the defendant has any claim to a set-off against McCall, or any defence which he could make against him which he could not make against the plaintiff. That the fertilizer was supplied by the plaintiff company was not disputed and it did not appear that McCall had paid for it. If McCall had bought it for himself and sold it to defendant

this court was without jurisdiction. If he sold it merely as agent and the company was the beneficial owner it had the right to bring the suit here. That question as a question of fact was, it seems to me, fairly submitted to the jury, and the finding of the jury ought to be conclusive upon a question of fact, unless the preponderance of testimony on one side or the other is so great that the court is satisfied that their finding is due to some bias, prejudice or favour which in its opinion is likely to have influenced it unfairly. I have no reason to believe that the jury in dealing with the question was so influenced. In all cases between corporations and individuals it is within the experience of all that the bias is more likely to be
126 towards the individual and against the corporation than otherwise; but the jury that heard this case was an unusually intelligent one, and I have no reason to believe that it was unduly influenced one way or the other, and after a long deliberation it found a verdict which, I think, is supported by the testimony. While there may have been some apparent conflict in the testimony, and certain isolated expressions, which might have led to another conclusion than that actually reached, it is the peculiar province of a jury to weigh conflicting testimony, and their verdict ought to stand, unless it is obviously wrong, or unless the court believes that it has been misled or has been moved by some improper consideration.

I do not find any ground for so holding, and the motion for new trial is therefore refused.

WM. H. BRAWLEY,
U. S. Judge.

July 29, 1905.

Judgment.

Filed April 4, 1905.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
against
J. P. KIRVEN, Defendant.

This action having been brought to a trial at a Circuit Court held on the 16th and 17th days of March, A. D., 1905, and a verdict for the plaintiff having been rendered therein by the jury for the sum of nine hundred and eleven 07-100 dollars, and the costs having been adjudged at sixty-three 77-100 dollars.

Now, on motion of Mitchell and Smith and Willcox and Willcox, attorneys for said plaintiff,

It is adjudged that the plaintiff, the Virginia-Carolina Chemical Company, recover of said defendant, J. P. Kirven, nine hundred

and eleven 07-100 dollars, so found, with sixty-three 77-100 dollars costs.

MITCHELL & SMITH,
WILLCOX & WILLCOX,
Plaintiff's Attorneys.

[SEAL.] C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

127 *Bill of Exceptions.*

Filed August 3, 1905.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

Be it remembered that on the 16th day of March, 1905, at the regular term of the said court, begun and holden at Columbia, in and for the District of South Carolina, before his Honor, Wm. H. Brawley, presiding judge, the above entitled cause came on to be heard before the said judge presiding in the court with a jury, the plaintiffs being represented by Messrs. Mitchell & Smith and Willcox & Willcox, their attorneys, and the defendant by Messrs. Smythe, Lee & Frost, Geo. W. Brown, Stevenson & Matheson and Woods & MacFarlan, as his attorneys.

At the trial the following proceedings were had and exceptions taken:

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL CO.
vs.
J. P. KIRVEN.

Messrs. Wilcox & Wilcox and Mitchell & Smith, Pl'ff's Attorneys; Messrs. Smythe, Lee & Frost, Stevenson, and Matheson & Brown, Def'd't's Attorneys.

MARCH 16, 1905.

Mr. WILCOX: The plaintiff replying to the counter-claim, denies each and every allegation thereof.

2. Plaintiff admits that subsequent to the bringing of the suit it has received as a credit on the note sued on the sum of $1,723.40 and $571.59, of date 17th of June, 1904, and that said credits arose

out of an attachment in Wilmington, N. C., in the Superior Court of the State of North Carolina in the case of Virginia-Carolina Chemical Co. against J. P. Kirven, from the proceeds in the hands of Alex. Sprunt & Sons, of the cotton attached.

Mr. Smythe makes a motion that counsel amend his reply by saying how many bales of cotton were attached.

128 Mr. WILCOX: There was no cotton attached; we attached the proceeds and recovered the proceeds of 70 bales.

Counsel have agreed to a stipulation with reference to certain testimony which is not regularly in, in that it has not been filed by the several parties, but we have a copy of it here and file it with stenographer:

"It is hereby stipulated between counsel that it will be admitted in the evidence as a fact on the trial of the above stated case that the fertilizers, the purchase price for which is set out in the note described in the complaint in this action, were manufactured by the Berkeley Phosphate Company of Charleston, S. C., in the early part of 1898, and shipped by said company from Charleston, S. C., to Hoves and Auburn and Mont Clare, all in the County of Darlington, in the State of South Carolina, and that defendant need not introduce the testimony of witnesses to prove said fact.

It is further stipulated and agreed that it will be admitted in evidence as a fact on the trial of the above stated case that the Virginia-Carolina Chemical Company, the plaintiff in this action, was engaged in the business of selling fertilizers in the County of Darlington and other sections of the State of South Carolina, during the entire year of 1898, and that said Virginia-Carolina Chemical Company at various times shipped fertilizers to parties in the County of Darlington to whom they had sold such fertilizers.

It is further stipulated and agreed that the testimony of P. H. Fuller, appearing in the printed brief for the Supreme Court in the case entitled Virginia-Carolina Chemical Company *vs.* J. P. Kirven, same being an issue between said parties as to the amount due upon a lien given by the said J. P. Kirven to S. M. McCall and by him alleged to have been assigned to said company, or any part of said testimony shall be used in evidence either by the plaintiff or the defendant in the trial of the above stated action by reading the same to the court and jury without the appearance of the said P. H. Fuller as a witness.

These stipulations are made to save the attendance of witnesses. The right, however, of either party to object to the admissibility of any and all such facts on the ground of irrelevancy and incompetency is hereby reserved."

S. M. McCALL sworn.

By Mr. WILCOX:

Q. Mr. McCall, where do you reside?

A. At Mayesville, in Sumter County.

129 Q. Where did you reside in 1898?

A. At Mayesville.

Q. Same place?

A. Yes, sir—that is, I was there during the cotton season, and my original home was at Florence; I don't remember positively whether I was there that whole year or not. I know I was there during the winter and fall season.

Q. Relative to the transaction that you allege to have had with Mr. Kirven, as to the sale of certain fertilizers to him at a certain time and taking his note therefor, kindly give us the circumstances of that sale?

(Mr. WILCOX: Our alleged note is lost and destroyed and we will later prove the loss of the note.)

WITNESS:

A. Well, sir, I went to Mr. Kirven to buy cotton, and did buy it, and while over there we talked about fertilizers and he showed me some prices; I don't remember who from, however. I told him that I thought that I could beat those prices if I could sell him at all, and told him some prices that I had gotten, and I made a conditional trade with him, that is that I was to sell him so much goods, provided I could arrange with the Virginia-Carolina Chemical Co., and W. S. Trebble, at Richmond, if I could arrange with the company, and I made him those prices, but I was to write him from Mayesville after I went back and conferred with these people to see if I could make arrangements to sell him the goods and I did write them and did make the arrangement and sold him so much goods as the agent for this company; my recollection is it was something over $2,200.00.

Q. Did you see him after you conferred with the house or did you write him?

A. No, sir, I wrote him, and I would like to see those letters, or copies; I have lost some of my correspondence, but I recognize some letters that I testified to.

(Shows witness letter.)

Mr. Smythe objects to the introduction of the letter, stating: My friend is proposing to offer a letter written by McCall to Kirven, the defendant; the allegation of the complaint is that McCall was not interested in this sale and therefore was not a party and there is no evidence that that letter was ever received by Kirven, or ever answered by him; McCall is the agent of the V. C. C. Co., therefore this is a letter written by an agent of the V. C. C. Co. and introduced in behalf of the V. C. C. Co., without any proof that it was ever received by the defendant or that the defendant acquiesced in any way.

130 Plaintiffs state that they have given notice to the defendants to produce.

Defendants state that they have no such letter.

Mr. Wilcox wishes to introduce the letter under the notice, and if it is not substantiated under the evidence they will rule it out.

Mr. WILCOX:

Q. Did you write a letter of which that is a copy?
A. Yes, sir.
Q. Whom did you send it to?
A. To Mr. Kirven.
Q. Do you know whether he got the letter?
A. Yes, sir, I know that he did, and he forthwith and immediately begun to order out goods.

COURT:

Q. Did you get a reply in writing from him to that?
A. Yes, sir; he replied to that letter, and also sent some orders of goods to be shipped to various points, but I have not that letter in hand, but I remember it.

Mr. WILCOX: It seems to me that we have laid the foundation.

Mr. SMYTHE: The witness says there was an answer and we would like the answer to be produced; we deny anything but the letter.

COURT: Ask him what became of his correspondence.

Mr. WILCOX:

Q. What has become of your correspondence?
A. It has been lost or destroyed, I reckon, I really don't know what has become of it, I know I have not got it.

Court admits the letter for the present. Exception noted by the defendants.

The following is a copy of the letter:

"MAYESVILLE, S. C., *Feb'y 17th*, 1898.

Mr. J. P. Kirven, Dovesville, S. C.

DEAR SIR: I have conferred with my house in regard to supplying you with the fertilizer you bought of me and we can furnish them on the terms you mentioned of a lien on your cotton crop. You had better let me order them out pretty soon so that you will have them in plenty of time, as it takes several weeks to get them delivered. I will meet you at Darlington in a week or two and we can fix the papers. Let me hear from you.

Yours very truly, S. M. McCALL."

131 Mr. WILCOX:

Q. Were the fertilizers ordered by him under that letter?
A. From time to time, yes, sir; he sent me several letters.
Q. Were they delivered to him?
A. Yes, sir; he admitted that they were; I was not there and saw them delivered.
Q. Did he give any papers for any securities?
A. Yes, sir.
Q. What were they?
A. He gave a lien on his cotton crop, and his note.

Mr. Wilcox offers to prove *that* the loss of the note and if he does not prove it he desires to prove the contents of the note another way.

Q. Mr. McCall, is this a copy of the note that Mr. Kirven gave?
A. Yes, sir.
Q. Kindly read it.
A. Copy note, "Darlington, S. C., March 14, 1898, $2,298.00, on October 25 next after date, promise to pay to the order of S. M. McCall twenty-two hundred and ninety-eight dollars at any bank in Darlington, S. C. Value received, signed J. P. Kirven."
Q. Read the balance of it.
A. "Due Oct. 25, endorsed S. M. McCall, pay to the order of S. M. McCall, for collection account of Virginia-Carolina Chemical Co., S. W. Travers & Co. Branch, pay to Bank of Darlington. S. M. McCall."
Q. Why was that note taken in your name?
A. Well, I simply took it as a matter of convenience to me, and immediately transferred that to S. W. Travers & Co.
Q. Did you have any interest in that note?
A. Yes, sir.
Q. What interest?
A. I had a commission on the goods.
Q. Did you have any interest in the note as owner of the note?
A. No, sir.
Q. Or the lien?
A. No, sir.
Q. Why did you transfer it to the V. C. C. Co.?

COURT: He said he transferred it to S. W. Travers and Co.
WITNESS: They were agents of the V. C. C. Co., at Richmond.

Mr. WILCOX:

Q. You have read your endorsements on that note?
A. Yes, sir; I would like to have an opportunity to explain why there were so many endorsements.

132 Cross-examination.

By Mr. SMYTHE:

Q. Where do I understand you to say you were living in 1898?
A. I was at Mayesville during the fall and winter, for eight months, during the cotton season; I was doing business there, but my family lived at Florence, and I was there during the summer.
Q. Where were you living the year previous?
A. Same way.
Q. And since then you have continued to live in that same neighbourhood.
A. Since then I am regularly living at Mayesville.
Q. So at that time and before and since you have been a citizen of South Carolina?
A. Yes, sir.
Q. What was your business?
A. Well, my main business was cotton buying, and handling fertilizers, etc., and sort of brokerage business.

Q. You were buying cotton and handling fertilizers?

A. Yes, sir.

Q. Had you been occupied in that business for some little while?

A. As near as I remember that is the first year I ever handled any fertilizers, but I would not say positively.

Q. How much fertilizer did you handle that year?

A. Outside of what I sold Mr. Kirven I handled, as near as I recollect, some $2,000.00 worth.

Q. You did handle other amounts then?

A. I bought some other stuff, yes, sir, and sold it, in the neighbourhood of $2,000.00.

Q. Do you recollect what price you paid to the V. C. C. Co. for these fertilizers that you sold to Mr. Kirven?

A. No, sir. I was getting a commission out of those fertilizers I sold Mr. Kirven. I had a special arrangement about that time; I had not bought the goods that Mr. Kirven bought except by special arrangement with the V. C. C. Co.

Q. And you had an interest as commission?

A. Yes, sir, that is all.

Q. And to that extent you had an interest in that note?

A. Yes, sir.

Q. You did not buy the goods on a written statement?

A. No, sir, not his goods.

Q. Did you have any agreement with the V. C. C. Co.?

A. Yes, sir.

Q. In writing?

A. Yes, sir, by letter.

Q. Will you let me have it?

A. I have not got it.

Q. Does not that agreement provide that you give your own note for these goods?

A. No, sir, not what I sold Mr. Kirven.

133 Q. You did not give your note to the V. C. C. Co. for those goods?

A. No, sir.

Q. Did not you tell Mr. Kirven before this suit was brought that the V. C. C. Co. had your note and held you responsible for this amount?

A. No, sir, I could not have told him that because I did not give a note for the goods I sold him.

Q. Did not you tell Mr. Kirven that you were going to be the sufferer if that note was not paid?

A. Yes, sir, I told him that I would suffer if it was not paid, I would lose my profits.

Q. That all?

A. Yes, sir.

Q. Did not you tell Mr. Kirven that you would have that note to pay?

A. No, sir.

Q. Did not tell him that?

A. No sir, and I did not have to pay it.

Q. At the time that you made this contract with Mr. Kirven, did you not tell him that you had bought these goods, or arranged to buy them, at one price, and that you could sell them at another to him, and still sell at a lower price than the other man offered him?

A. I have no recollection of that, but I remember that he showed me some prices and I told him that if — could sell him I could better those prices, and told him what I could sell him at.

Q. I want to caution you, because we may contradict you on that: Did you not at the time you made this contract with Mr. Kirven at his house in Darlington County, state to him that you had got a price on the goods and that you could sell the goods and make a profit and yet beat the price that the other man was charging you?

A. I could not answer that; all I know is that I made him a price that he accepted, provided I could arrange to sell him the goods; it has been seven or eight years, and I could not remember all the details.

Q. You don't recollect that?

A. No, sir.

Q. You recollect what Mr. Wilcox asked you?

A. What was that?

Q. In that second conversation, about your being liable on the note, and you having to pay the V. C. C. Co., did not you say that to Mr. McCall just before the bringing of this suit, when you met him in Darlington?

A. I told you what I did say to him: I said that if he did not pay those things that it would hurt me, that is what I told him.

Q. You did not tell him that you were liable on that note?

A. No, sir; because I have never been held responsible for it, but I told him it would hurt me if it was not paid.

134 Q. You say you had a contract with the V. C. C. Co. for fertilizers that season, how much of it was bought by you?

A. About, as well as I remember, $2,000.00. I would not say positively.

Q. That is a regular contract you had with the V. C. C. Co.?

A. Yes, sir: that is the only regular goods that I bought from them straight.

Q. But was that the only contract you had with the V. C. C. Co.?

A. Well, I had agreement by the letter.

Q. Where is that letter?

A. I have not got it.

Q. What was that letter?

Q. Letter to the effect that it was a large amount and they did not like to sell one man that much stuff, but that they would sell it on the securities that I mentioned in the letter.

Q. What was that security?

A. Lien on his crop and his note, and I think some other security, but I have forgotten.

Q. His note with your endorsement, was not it?

A. No, sir, I did not endorse it to the company.

Q. Was not that part of the terms, that when Mr. Kirven gave the note you were to endorse it?

A. No, sir, I did not understand it that way.

Q. But you did it all the same?

A. Yes, sir, I took it in my hands and endorsed it, to them, but I was not responsible for it.

Q. Please look at that and tell me if that is a copy of the agricultural lien that you took from Mr. Kirven?

A. Yes, sir, as well as I remember that is the paper.

Q. That is a copy of the lien?

A. Yes, sir, as well as I remember.

Q. Does that say anything about the V. C. C. Co.?

A. I don't think it does.

Q. This lien is dated 14th of March, 1898, was that the date of the sale?

A. No, sir, I think it was dated after that.

Q. You think this was dated after the sale?

A. I think so.

Q. This matter has been in litigation several times, has it not?

A. Yes, sir.

Q. Were not you examined in the case of the Virginia-Carolina Chemical Co. against J. P. Kirven, when they sought to enforce that agricultural lien in 1899, before the court in Darlington?

A. Yes, sir, somewhere about that time.

Q. Were not you called on to prove that agricultural lien, and prove that note, at that time?

A. Well, I don't remember, I think so; I know I testified then, but I don't remember.

135 Q. Don't you know you testified as to that note and as to that lien?

A. I think I did, yes, sir.

Q. Did not you say then "Q. That note and lien were the property of the V. C. C. Co.?" and you answered: "No, sir."

A. No, sir, I have no recollection of that.

Q. Were not you asked, the next question: "Q. Are you running a manufacturing concern?" and you answered: "No, sir."

A. I guess I answered that way.

Q. Were not you asked the question: "Q. Were not that lien and that note taken in your name as a matter of convenience?" and you answered, "They were taken in my name."

A. Yes, sir, it was taken in my name, I don't remember what I answered.

Q. Were not you asked: "Q. Did not you take the note and lien for security for payment for the fertilizer?" and you answered, "Yes."

A. Yes, sir.

Q. Were not you asked: "Q. Then as a matter of fact, the note and lien were taken as the property of the company?" and you answered, "No, sir, not until I, transferred them, because I had the privilege of paying for those fertilizers or keeping them for the company, as I saw fit, therefore I do not know at the time whether I took them or reserved them for the company."

A. Yes, sir.

Q. That is the truth, is it not?

A. Yes, sir.

Q. Were not you asked at that same time: "Q. Were not that lien and that note taken in your name for the benefit of the company?" and you answered: "No, sir, I took them to secure myself and afterwards transferred them to the company."

A. Yes, sir, I might have answered that, I don't know, I don't remember whether that is what I said or not.

Q. As a matter of fact, you did not transfer them immediately, did you?

A. Yes, sir, in a few days, as soon as convenient, I think, that is my recollection, I would not say positively.

Q. In the second trial, between these same parties, when the case came back from the Supreme Court, were not you examined again on those same matters, the second time?

A. No, sir, I have no recollection of ever being examined myself, more than once.

Q. You were not examined the second time, in 1901?

A. I don't know, I know I was examined once at Darlington.

Q. You don't recollect having been examined the second time?

A. No, sir, I don't remember.

Q. Were not you asked at that time: "Q. You transferred the lien subsequently?" and you said, "Yes, sir."

A. Well, I don't know. I had transferred it subsequently, but I don't know.

136 Q. Were not you asked at the same time: "Q. A month or two or two or three months or about how long after the execution of it?" and you answered: "probably two months."

A. I might have, yes, sir.

Q. And that was true?

A. Well, I don't remember.

Q. Well, if you said that under oath, you believed it to be true when you said it?

A. Yes, sir, if I said that it is correct.

Q. And as a matter of fact they were transferred about a couple of months afterwards?

A. Some time afterwards, I could not say whether it was two weeks or two months.

Q. That letter that was introduced just now by you was dated Feb. 17, 1898, how did you put in it was dated Feb. 17, 1898, that note and lien were not dated until 14th of March, 1898. That is correct by those dates, is it not?

A. Approximately, I think so.

Q. You took that note and lien nearly a month afterwards in your own name, did not you?

A. Yes, sir.

Q. And you held that for a couple of months before you transferred that to the V. C. C. Co?

A. Yes, sir, I held that for some time, I don't remember how long?

Q. Then you put a blank endorsement on the note and turned it over?

A. I endorsed it.
Q. Do you know from what point those goods were shipped?
A. I am under the impression they came from Charleston.

Redirect.

Mr. WILCOX:

Q. When Mr. Smythe was asking you if you did not say so and so, at a certain time, did not Mr. Brown ask you this question, Mr. Brown representing Mr. Kirven——

Mr. SMYTHE: When?
Mr. WILCOX: At that same time, that first trial.

Q. Did not Mr. Brown ask you this question: "Q. Was it not your purpose when you took these papers to transfer them to the V. C. C. Co."? and was not your answer, "I expected to do it."
A. Yes, sir.
Q. Did Mr. Brown also not ask you this: "Q. Were not you the agent of the V. C. C. Co. in the sale of those fertilizers?" and was not your answer: "Yes, sir."
A. Yes, sir.

COURT:

Q. When the note was endorsed by you first, and you say turned over to the company, did it ever come back into your possession?
A. Yes, sir; in this way; they sent it back to me just a little before it was due for collection for their account.
137 Q. Is thei*r* any outstanding account between you and Mr. Kirven, the defendant here? Had you any other transactions with him, do you owe him any money?
A. No, sir.
Q. No ot'er transactions?
A. No, sir; since that.

Mr. SMYTHE:

Q. You have had other transactions with Mr. Kirven, have not you?
A. I may have bought a lot of cotton from him since then.
Q. Did not you buy cotton seed meal from him too?
A. No, sir.
Q. Never bought any cotton seed meal from Mr. Kirven?
A. Not that I remember; I have no recollection of it; if I did I paid him for it, I will say that.
Q. Did not you say the time you were examined in 1899, you were asked: "Q. About that time did you buy any cotton seed meal from Mr. Kirven?" and you answered: "Yes, after I sold him the fertilizer I bought ten tons of meal, or 20, and he wrote me he could supply me with ten tons, so I bought ten tons."
A. Well, I may have done so, I don't remember; I don't say I did not.

P. A. WILCOX, Esq., being duly sworn, states:

As a member of the firm of Wilcox and Wilcox I received the note and lien described in the complaint for collection; I had both the note and that lien in possession for quite a while.

Mr. SMYTHE: We don't desire Mr. Wilcox to go through the formality of being sworn; let him just state that he had the note and lost it.

Mr. WILCOX: There is one other point I would like to state.

COURT:

Q. Was the note a copy of this note?

A. Yes, sir; with the endorsements on it; and we had that note in two or three trials in Darlington, the Supreme Court and Wilmington, N. C., and in the mix up it has been lost, and you will find in the Supreme Court brief we had that it was admitted that it was lost at that trial; I desire to state further that we have had that note for collection and that nothing whatever has been paid upon that note, except the following credits: $1,723.40 and $571.59, of date June 17, 1904. We sued for the full amount of the note, $2,298.00, with interest from the date alleged in the complaint, at that time this credit had not been received. Pending this suit there was an attachment in Wilmington, N. C., in another suit pending, and these credits arose from the proceeds of the judgment in attachment obtained by the V. C. C. Co.

138 Mr. SMYTHE: Put your statement in, you don't know personally those matters.

Mr. WILCOX: Yes, sir, absolutely.

Q. Were you there?

A. Yes, sir, personally.

Mr. Smythe submits that the papers are the best evidence of what took place in that suit.

Mr. Wilcox calls attention to the attachment in that case; this is certified copy of the record by Judge Allan of North Carolina, giving the date of the receipt of the warrant and attachment.

Mr. SMYTHE: As you are making a statement, may I ask you if those are not presumed to be true copies of the record in those two cases?

A. No, sir, not at all, those are South Carolina cases.

Q. I mean in these two South Carolina cases?

A. Yes, sir.

Q. These are correct, are not they?

A. That is the presumption, yes, sir, stenographer's report.

Counsel for defendant offers the previous record in the Supreme Court of South Carolina, April term, 1901, between Virginia-Carolina Chemical Co., plaintiff, appellant and J. P. Kirven, defendant respondent; and record in the Supreme Court of the State of South Carolina, November term, 1899, Virginia-Carolina Chemical Co., plaintiff respondent against J. P. Kirven, defendant appellant.

Q. Are those correct transcripts of what took place in those two cases?

A. So far as I know they are correct transcripts.

COURT:

Q. When was this note put in your hands for collection?

Mr. WILCOX: The note was placed in my hands for collection on or about the maturity of the note, by the V. C. C. Co. from the Richmond office, and I can also state a fact that is in my knowledge, and I suppose it will be admitted by my friends, that S. W. Travers and Co. were simply the denomination of the Richmond end of the V. C. C. Co., just as the Navassa Duella Co. of Wilmington, or the Berkeley Phosphate Co. of Charleston.

COURT:

Q. You mean they were the general selling agents?

A. Yes, sir, they were the general selling agents, and it would be denominated the "V. C. C. Co., S. W. Travers, agents," and in a great many cases the branch held as a matter of courtesy their old name.

139 Mr. SMYTHE:

Q. They did not maintain a separate existence?

A. No, it is the Virginia-Carolina Chemical Co.

Q. You don't know whether they maintained a separate corporate existence or not?

A. Yes, sir, I know that the V. C. C. Co. is a corporate entity.

Q. But you do not know whether, when they purchased the S. W. Travers Co., the corporate existence of the S. W. Travers Co. ended?

A. Yes, sir, that is my information.

Q. Do you know that of your own personal knowledge?

A. Not from personal knowledge which will come from being present when the Secretary of State incorporated it, but I know it as I know a corporate branch of the Atlantic Coast Line Company.

Q. It is known that a good many of the companies which are owned by the V. C. C. Co. do maintain their separate corporate existence, do you know by your own personal knowledge that that is not the case with S. W. Travers & Co.?

A. I know that the S. W. Travers & Co. was owned by the V. C. C. Co. at the time this note was given, and it is a part of the capital of the V. C. C. Co.

Q. But you do not know whether S. W. Travers and Co. was not kept up as a separate corporation?

A. No, I do not know it in that sense, but I do know that it is a part of the V. C. C. Co., and an integral part of the corporation.

Mr. Wilcox places in evidence a copy of the note as heretofore proved.

Mr. WILCOX: There is one piece of evidence that I desire to put up at this time; I have a part of the original record from Darlington, in the case.

C. S. McCULLOUGH, sworn.

By Mr. WILCOX:

Q. Do you know Mr. J. P. Kirven's signature? (Showing witness paper.)

A. Yes, sir, that is it.

Q. Is that his signature?

A. Yes sir.

Mr. WILCOX: I will state that this is a part of the original record in the case, and affidavit.

Mr. SMYTHE: We object to this on two grounds: 1. Because it only purports to be a part of the record; we object to the introduction of a part of the record and not all the record. 2. We object to it because these show on their face that they are the original court records of the Court of Common Pleas at Darlington, and under the laws of the State of South Carolina it is a penal offence to have these identical papers outside of the clerk's office.

140 Mr. WILCOX: We brought them here at the request of your brother attorney, who requested me to do it.

Mr. SMYTHE: We object to this part of the record, because there — other parts of that record that we would like, and we object to our friend bringing in just a part of the record and asking us to introduce it.

COURT: Let him put in what he wants and you can put in the rest of it.

Mr. Willcox shows the court a printed copy of the original record, showing the affidavit referred to and his purpose of introducing it.

Mr. SMYTHE: If that paper is offered in evidence it must stay here, but it can't stay here because it is a record of the court at Darlington.

COURT: That is a matter in the discretion of the court; if it is offered in evidence it stays here until the court orders it to be returned; the court, of course, will order it to be returned at once and certified copy left here. He introduces a certain paper and you have the right to introduce the whole record if you desire it.

Court admits the affidavit. Defendant notes exception to this ruling.

Mr. Wilcox reads the affidavit to the court, signed by Mr. Kirven, on the 17th of January, 1899.

Mr. Smythe again makes objection to Mr. Wilcox introducing part of the original record, on the ground that he is entitled to the whole record if he is going to introduce it at all.

Mr. Wilcox states that if the whole record was introduced it would bring into this case things that are not only eliminated at the start, but have been purposely eliminated by the answer, and if there are things in the record that are absolutely incompetent he has no purpose in introducing it.

COURT: The record is here; if you want to introduce it you can present any part of it.

Mr. SMYTHE to the Witness:

Q. (Showing witness signature:) Is not that Mr. McCall's signature?

A. Mr. Smythe, I don't know Mr. McCall's signature, I don't know that I have seen it.

Q. Is that Mr. R. L. Dargan's signature?

A. I really don't know.

141 Q. Well, the only signature you can swear to is Mr. J. P. Kirven's?

A. No, sir; I have never seen Mr. McCall's signature in my life; Mr. Dargan has been dead for about ten years, and I don't know his signature.

Q. Is that his signature?

A. I don't know; I think it is, but I could not swear to it; things that I have seen in the last two or three years I can swear to.

Mr. Smythe offers this paper as part of the record introduced by Mr. Wilcox.

COURT: When the time comes for you to introduce testimony the court will hear you as to the admissibility of the whole record; I have ruled that the paper offered by Mr. Wilcox, signed by J. P. Kirven, whose signature is proved by the witness now on the stand, is competent testimony.

Mr. SMYTHE: The only point we want to make is that Mr. Wilcox cannot offer that part of the record without offering the entire record, and offering the entire record we are entitled to other parts of the record as part of his testimony which he has introduced.

COURT: When the time comes for you to offer testimony the court will rule upon it, and as at present advised, I don't see any reason to doubt that the whole record will be admitted. The court ruled that Mr. Wilcox has offered one paper.

Exception noted by defendants to this ruling.

Plaintiffs rest.

Mr. Smythe, on behalf of defendant, submits a motion for a non-suit, on two grounds, as follows:

"And now comes the defendant and at the close of the plaintiff's testimony in this case, moves the court to order a non-suit in favor of the defendant for the following reasons:

1. Because under the judiciary act of the United States, no Circuit Court shall have cognizance of any suit * * * in favor of any assignee of other subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

Under this rule it is the duty of the plaintiff to show jurisdiction, and to show either that the assignor S. M. McCall, the original payee of the note possessed the requisite citizenship to maintain the

142 action in this court, or that the said S. M. McCall never had a cause of action against the defendant, and therefore by his endorsement of the note did not in fact assign or transfer any right of action, and that plaintiff had right of action without such endorsement.

Whereas, it is respectfully submitted that the uncontradicted testimony of the plaintiff, including that of McCall himself, a witness for the plaintiff, shows that the note of the defendant in question was taken by McCall, the original payee, to secure himself, and was not the property of the plaintiff company until transferred by McCall to it. That therefore the suit could not have been brought by the company without the endorsement of S. M. McCall, and inasmuch as the testimony shows that S. M. McCall is a citizen of South Carolina, as is also the defendant, J. P. Kirven, this court has no jurisdiction and the verdict must be for the defendant.

2. Because it appears from the undisputed evidence in the record that the note sued on herein was dated March 14th, 1898. That at that time the plaintiff, the Virginia-Carolina Chemical Co., a corporation of the State of New Jersey, was doing a large fertilizer business in the State of South Carolina. The plaintiff's testimony failed to show that it had complied with the provisions of the general law of South Carolina as now collated in Chapter 44 of the Civil Code of South Carolina of 1902.

That the statutes of this State forbid any foreign corporation from doing business herein without complying with the terms of such chapter, making the doing of such business a criminal offense, and the company liable to indictment, and upon conviction thereof to a fine.

Such chapter further provides that it shall be unlawful for any such foreign corporation so to do business.

That therefore, if it be held that the contract was made between the defendant and the present plaintiff, then it was a contract made by a foreign corporation, the Virginia-Carolina Chemical Co. being a citizen of the State of New Jersey, and the plaintiff having failed to show that it had complied with the statutory conditions enabling it to do business in South Carolina, which constitute conditions precedent to the lawful conduct of such business, it therefore cannot maintain this action." Motion for non-suit is refused and exception noted by defendants.

The following is a copy of the affidavit of J. P. Kirven above referred to as offered by Mr. Wilcox:

143 (Same should be inserted before the close of plaintiffs' testimony.)

"STATE OF SOUTH CAROLINA,
County of Darlington:

VIRGINIA-CAROLINA CHEMICAL CO.
vs.
J. P. KIRVEN.

Warrant to Seize Crop Under Lien.

Personally appears J. P. Kirven, who being first duly sworn, deposes and says: that on the 17th day of February, 1898, he contracted with and bought from the Virginia-Carolina Chemical Co., through

its agent, S. M. McCall, 74 tons of dissolved bone at $10.50 per ton; 7 tons of acid phosphate at $10.20 per ton; 55½ tons of kainit at $13.50 per ton; and 35 tons of National Special Tobacco Fertilizer at $20.00 per ton, amounting in the aggregate to $2,298.00, which goods and fertilizers from that date were to be held subject to the order of deponent and shipped out as might be requested by him, as will more fully appear by a letter of that date from the said S. M. McCall to deponent, hereto attached as a part of this affidavit and marked Exhibit "A." That pursuant to the terms of said purchase this deponent, on the 19th day of February, 1898, sent an order for the shipment to Auburn, S. C., of 8 tons of dissolved bone and 2½ tons kainit; and for shipment to Floyds, S. C. of 35 tons of dissolved bone; 20 tons kainit; and 15 tons tobacco fertilizer; and on the 23rd day of Feb., 1898, this deponent likewise sent an order for the shipment to Doves, S. C. of 5 tons of kainit and 5 tons dissolved bone; and for shipment to Floyds, S. C. 15 tons of tobacco fertilizer; 10 tons of dissolved bone and 20 tons of kainit; and on the 10th day of March, 1898, he sent an order for the shipment to Mont Clare, S. C. of 10 tons of dissolved bone and for shipment to Floyds, S. C. 6 tons of dissolved bone; 8 tons of kainit; 5 tons of tobacco fertilizer; 3 tons of nitrate of soda; and 7 tons of acid phosphate, all of which goods were received by this deponent from the said Virginia-Carolina Chemical Co., except the 3 tons of nitrate of soda, which were never shipped or received. In compliance with the said orders the said Virginia-Carolina Chemical Co. shipped and consigned to this deponent at Floyds, S. C. on Feb. 26, 1898, 15 tons of national special tobacco fertilizer at the agreed price of $20.00 per ton; on March 1, 1898, 20 tons of kainit at $13.50 per ton, and on March 5, 1898, 35 tons of dissolved bone at $10.50 per ton. That on March 7, 1898, the said company shipped and consigned to deponent at Auburn depot, S. C. 8 tons of dissolved bone at $10.50 per
144 ton; and 2½ tons of kainit at $13.50 per ton and on the same day consigned to deponent at Floyds, S. C. 10 tons of dissolved bone at $10.50 per ton and 15 tons national special tobacco fertilizer at $20.00 per ton; and on the 9th day of March, 1898, shipped to deponent at Floyds, S. C. 20 tons of kainit at $13.50 per ton. That the said company on the 19th day of March, 1898, shipped and consigned to deponent at Doves, S. C. 5 tons of dissolved bone at $10.50 per ton; and 5 tons kainit at $13.50 per ton; and on the 21st day of March, 1898, shipped to deponent at Floyds, S. C. 5 tons of national special tobacco fertilizer at $20.00 per ton; 7 tons of acid phosphate at $10.20 per ton; and on the first day of April, 1898, shipped to deponent at Floyds, S. C. 6 tons of dissolved bone at $10.50 per ton, and 8 tons of kainit at $13.50 per ton. That on the 23rd day of March, 1898, the said company shipped and consigned to deponent at Mont Clare, S. C. 10 tons of dissolved bone at $10.50 per ton. That the dates and amounts of said shipments and their destination will more fully appear by the affidavits of W. D. Williams, J. O. DuRant, Jr., and J. C. Dove, hereto attached and made a part of this affidavit, and marked exhibits B., C. and D. That all of the said fertilizers were covered by deponent's contract of purchase with the

said S. M. McCall, agent, of date 17th day of February, 1898, and on and after that date were the goods of the deponent and subject to his order. All of these goods, 125½ tons, of the value of $1,730.25, were actually delivered to the railroad company by the said Virginia-Carolina Chemical Co. for transportation to deponent prior to the 14th of March, 1898, and that the balance, to-wit, 46 tons, of the value of $567.75, were consigned subsequent to that date, but in compliance with orders prior to that date. That prior to the said date 95 tons were shipped to deponent at Floyds, S. C., and subsequent to that date 26 tons. That prior to that date there were shipped to deponent at Auburn, S. C. 10½ tons, and that subsequent to that date there were shipped to deponent at Dovesville, S. C. 10 tons, and to deponent at Mont Clare S. C. 10 tons.

That on the 14th of March, 1898, deponent gave his note for the purchase money of the said fertilizers to the said McCall, agent, as aforesaid, and as security for the same executed what purported to be an agreement for *or* agricultural lien upon all the crops to be raised on his home place in Darlington County during the year 1898. That deponent is a planter, and also a dealer in agricultural supplies, and each year purchases fertilizers for use in the cultivation of his crops, and also for sale to farmers, planters, and tenants,
145 who are accustomed to deal with him and to obtain from him their yearly supplies. That he owns and cultivates a tract of land in Darlington County containing three hundred and sixty-five (365) acres known as the Home Place, and that he also owns and either cultivates or rents out six other tracts of land located near his said Home Place. That supplies for his Home Place, and for the other six tracts all come and are received by him at Floyds station, that being the nearest railroad station. That where goods are shipped to him at other stations they are intended for delivery to parties to whom they have been sold by deponent, and that all of these facts were well known to the said S. M. McCall, agent, as aforesaid on the said 17th day of March, 1898, and also on the said 14th day of March, 1898. That he himself had purchased fertilizers from deponent and well knew that the fertilizers that deponent ordered through him to be shipped to Doves, Mont Clare, and Auburn were not to be used in the cultivation of deponent's crops, but were for sale to his customers.

That under the warrant issued by W. Albert Parrott, Clerk of the Court of Common Pleas in and for Darlington County, to enforce what the said Virginia-Carolina Chemical Co. claims to be an agricultural lien on the crops grown the present year by deponent on his said Home Place the Sheriff of Darlington County has seized 30 bales of cotton that were produced upon the said place, and the said Virginia-Carolina Chemical Co. has made claim to 100 bales of cotton sold by E. E. Kirven, a brother of deponent, on or about the 23rd day of November, 1898, to Alex. Sprunt and Son of Wilmington, N. C. and now in their hands at that place, contending that they also were raised — deponent's Home Place and are covered by the said pretended lien. There is no foundation for this claim. Fifty bales of the said one hundred bales were owned by the said E. E.

Kirven, the larger part having been raised by him on his own plantation. The remaining fifty bales all belong to this deponent, not having been grown by him, but having been received by him from his tenants and customers. These fifty bales, in no way affected by the claim of the Virginia-Carolina Chemical Co., were turned over by this deponent to his said brother to sell and apply the proceeds in part payment of a large debt which deponent was owing him. The said E. E. Kirven owned the said one hundred bales when he sold the same to Alex. Sprunt and Son, and not a single bale of the same was grown on the Home Place of this deponent or is in any manner affected by the agricultural lien which the said company claims to hold against this deponent. Deponent
146 has read the affidavit of R. L. Dargan, the same being one of the affidavits on which the said warrant was issued, and he denies having said to him as therein stated that the one hundred bales sold as aforesaid belonged to this deponent. He might have said to him that a part of the cotton had belonged to him, as he has never made any secret of this fact, and the said R. L. Dargan could have easily ascertained all the facts as to the said one hundred bales if he had inquired.

Deponent further says that the fertilizers purchased by him as aforesaid from the Virginia-Carolina Chemical Co. and shipped and delivered to him, all are in sacks, and on the sacks containing the dissolved bone, acid phosphate and tobacco fertilizer there was stamped in large letters the following: "Manufactured (or prepared by) Virginia-Carolina Chemical Company, S. W. Travers & Co., Branch, Richmond, Va.

Deponent further says that he is contesting the validity of the lien claimed by the Virginia-Carolina Chemical Co. not with any purpose or desire to evade the payment of a just debt. That the fertilizers sold to him as aforesaid by said company were through its gross carelessness in their manufacture worse than worthless, and that they destroyed in large parts the crops of deponent and the crops of those to whom he sold portions of the same. That he is honestly claiming that there was failure of the consideration for which the obligations to secure the payment of the purchase money of the said fertilizers were executed by him, and that he is entitled to damages in a large amount for the injury inflicted on him by the sale to him of the said fertilizers and has brought suit for the same. That pending the settlement of this defence and this claim, he desires to secure himself from the additional loss that would ensure from the deprivation for months, and perhaps for years of the crops or their proceeds made this year on his home place. Under these circumstances, he feels he is justified in taking advantage of the facts above stated which he is advised render the agricultural lien claimed by said company on the crops raised on his home place invalid and void under the terms and conditions of the statute law of this State in respect to such liens.

(Signed) J. P. KIRVEN.

Sworn to before me this 30th day of December, 1898.

N. R. HARRELL,
Notary Public, S. C.

147 R. M. McEOWAN, sworn.

By Mr. SMYTHE:

Q. State what your position is?

A. Chief Clerk Secretary of State's Office.

Q. Have you made search through the records of that office for declarations, stipulations, and other charters, by-laws, filed by the Virginia-Carolina Chemical Co., in compliance with the requirements of the laws of this State?

A. I have.

Q. Will you please produce all the papers that you have found?

Mr. WILCOX: No testimony as to its compliance after 1898 would be applicable; it is a matter of indifference to the other side whether the V. C. C. Co., for the purposes of this case, has ever complied or not; if this was a case by which in a transaction of 1898 our friend was suing us for a penalty, it would be material, but as to whether or not they have complied for that purpose which prevents them from doing business unless they had complied, under Section 1792, that was an entirely subsequent act to anything we are concerned.

Mr. SMYTHE: They were acts in force in 1898 and prior, which made it applicable when this company filed.

Witness produces paper of date Jan. 22, 1900.

Q. What was that paper?

A. There were several.

Q. State what they were?

A. One is certified copy certificate of increase of capital stock of Virginia-Carolina Chemical Co. One is an annual statement. Another is a copy of the by-laws. Another is the certified copy of certificate of organization. The other is a declaration.

Q. Does that declaration state the place where the papers can be served?

A. (Reads declaration) No. 21 Broad St., Charleston, S. C.

Q. This is a stipulation showing the place and the parties on whom due process can be served?

A. Yes, sir.

Q. What other papers have you there?

A. There was also another certificate of increase of capital stock.

Q. Filed on what date?

A. Jan. 22, 1900.

Q. When were those other papers filed, give them chronologically.

A. The other 1902, Feb. 10, copy of by-laws; and Feb. 10, 1902, statement under section 1467 of Revised Statutes; certificate of increase of capital stock on the same date, Feb. 10, 1902; the next is an annual statement filed Jan. 29, 1903; the other is increase of capital stock, filed June 4, 1904; and another without a label, annual statement filed Jan. 19, 1904; Virginia-Carolina Chemical

148 Co., statement under section 1467 Revised Statutes of 1893, filed Jan. 13, 1905.

Q. That is all?

A. Yes, sir.

Q. Those constitute all the papers for the Virginia-Carolina Chemical Co. ever filed in the office of Secretary of State?
A. That is all on file that I am able to find.

Cross-examination.

Mr. WILCOX:

Q. You record all of these papers?
A. No, sir.
Q. Any other papers there I mean, of a certainty?
A. Oh, I could not say that in the course of the infallibility of man some papers were not lost, but I say this is all I have been able to find.
Q. And they comply with the laws of this State?
A. That is a question that I don't know that I am competent to answer.
Q. You would not say they have not?
A. No, I could not say they have or they have not.

Redirect:

Q. You got those papers from the regular book-case or wherever those papers of that character are kept?
A. Yes, sir.
Q. Regularly in the file?
A. Yes, sir; you refer to the secretary and when they are marked they are placed in this original file in which this section occurs.

Mr. Smythe offers the balance of that record in evidence.
Mr. WILCOX: We object on the ground that if there is any part of that record that is pertinent to any issue in the case, then we say it can be introduced. The one issue in this case is that S. M. McCall was not an agent; pertaining to that issue we introduced affidavit of Mr. Kirven.
COURT: The record will be introduced and they can call attention to any part of it that they want, but the court will require both Mr. Wilcox and yourself to have copies of any papers in the original record that you wish to go in this case, so that those original papers can be returned.
Mr. Smythe also asks to introduce certified transcript of part of the record in the case of Virginia-Carolina Chemical Co. against Kirven in the court in Wilmington, in which judgment was given for $1,723.40, the value of 70 bales of cotton attached herein.

149 J. P. KIRVEN, sworn.

By Mr. SMYTHE:

Q. You are the defendant in this case, are you not?
A. I am.
Q. Did you buy any fertilizers on or about the 17th of Feb. or March, 1898, from Mr. McCall?
A. I did.
Q. From whom did you buy them?
A. S. M. McCall.

Q. In the course of your negotiations was there anything said to you by Mr. McCall about the Virginia-Carolina Chemical Co.?

A. Not a word, sir.

Q. Who was selling them, as far as the representations of McCall were concerned?

A. S. M. McCall.

Q. Did he say that?

A. Said he did.

Q. How?

A. Said he bought them and sold them to me, making a profit.

Q. That was the way the transaction was?

A. Yes, sir; and he told me that he took these papers that he got from me and would deposit them in the bank, and get the money on them and give the company where he bought the fertilizers from his own individual note, and said further that he had a contract with the company to that effect.

Q. What did he say about having given a note to the company?

A. He said he could take those papers that he got from me and go to the Bank of Florence, he said, and get the money on them, and take his papers and send it to the company.

Q. Take his note and send it to the company?

A. Yes, sir.

Q. Did he say to you afterwards that he had given his note to the company?

A. Yes, sir.

Q. Did he say so?

A. Yes, sir.

Mr. Wilcox submits that counsel cannot lead his witness except in denial of Mr. Kirven.

WITNESS: He did; he told me this after he bought a big lot of cotton, I think over a hundred bales, from me, he says, "I can sell you fertilizers, have you got any prices? and I said, yes, I have, and I showed him, and he says, "Oh, I can beat them;" well, I said, if you can sell me under that the same goods, and good goods, you can, and he says, "I can do it, and make a good profit," and he quoted his prices, and they were very much under any I could buy and they were very low prices, and I bought some, and gave him my note secured by a lien; and he said further on—we were very good friends, close friends, had been knowing each other some time, intimate—and he says, "now, have you any meal?" I says, "yes I have got a good lot of meal. I could spare you probably 20 tons," and I shipped him ten tons, and he wrote me that *he* need not ship any more, that ten tons was sufficient.

Mr. Wilcox objects on the ground that the witness is testifying to letters right along.

WITNESS: So when the goods were shipped I noticed the goods on the bags was branded "S. W. Travers and Co., Richmond, Va."; I did not know anything before until later on, there was a complete destruction of my crop.

Mr. Wilcox objects to the latter clause on the ground that that whole question is taken out of the complaint.

Objection sustained and answer stricken out.

WITNESS: On that there was a suit commenced; I refused to pay the note on that ground and then there was a suit brought up—first McCall came to me——

Plaintiffs object to testimony about a suit being brought up.

Mr. SMYTHE: I asked Mr. McCall when he was on the stand whether he did not go to Mr. Kirven just before the suit was brought and tell him that he was liable for this debt, and notified him that I was going to contradict him.

COURT: Ask him the precise question that you asked Mr. McCall.

Mr. SMYTHE:

Q. Prior to the time the suit was brought did you have any conversation with Mr. McCall about the note and what was it?

Mr. Wilcox objects.

COURT: The way to contradict him is to ask him as nearly as you can in the words you asked Mr. McCall.

Mr. SMYTHE:

Q. You heard me ask Mr. McCall on the stand whether just about the time of the suit or prior thereto, he had an interview with you in Darlington in which he stated to you that he had given his note to the company, and that he was liable to the company, and if you did not pay the note he had to pay it, or words to that effect; tell us whether that is true or not?

A. That is true, sir, every word of it is true.

Q. Tell me as near as you can what Mr. McCall did say to you?

Mr. Wilcox objects to the method of examination.

COURT: Anything necessary for Mr. Smythe to bring out to make his defence is competent.

151 Mr. SMYTHE:

Q. Please state what Mr. McCall did say before?

Mr. Wilcox objects to the general question, because Mr. McCall was put upon notice, we are going to deny you.

COURT: You can reply to that at the proper time; any competent testimony necessary to the defence can be brought out.

Mr. SMYTHE:

Q. Please tell us what Mr. McCall did say?

A. He came to me and said, "look here, I do want you to pay that note"; well, I went on to explain to him why I was not going to pay it, and showed him my reasons, and told him to come on and go to my farm and look at my crop——

Court rules out any testimony about the crop.

WITNESS: I just want to say I generally pay my notes——

This last clause ruled out.

WITNESS: So he said, "now, I would not mind this so much,

but I am the sufferer"; he tried to work on my feelings, says, "I am the sufferer, they are going to hold me responsible and this is going to ruin me"; says, "they are going to make me pay this note, and if you don't pay it I have got to pay it," and I says, "no, I don't think you have got to," and that is about what ended right there, and then the suit commenced.

Q. When did you first know that the V. C. C. Co. had furnished these fertilizers?

A. I did not know it until the suit commenced; I did not know that when the suit commenced, I commenced to investigate and I first went to the depots where their goods were delivered, where they were shipped to, and I found there that these goods were shipped by S. W. Travers and Co., Branch, to J. P. Kirven.

Q. From what point?

A. From Berkeley Works, Charleston, S. C.; I did not know the V. C. C. Co. then any, but when these papers were served on me we went to a considerable litigation, lots and scores, and Mr. Boyd, my attorney, drew this affidavit; afterwards, seeing they were suing me as the Virginia-Carolina Chemical Co., Mr. Boyd drew this paper for me to sign as an affidavit and I signed it, not thinking but what——

Objected to by Mr. Wilcox.

Mr. SMYTHE: I am asking Mr. Kirven under what circumstances he signed that affidavit.

152 WITNESS: When the suit was brought it was brought by the Virginia Carolina Chemical Co., and Mr. Boyd, my attorney, fixed out this affidavit, and I think this affidavit was probably before Judge Watts, and there was considerable litigation over the matter and contention over it, and I signed it for the simple reason that I did not know but what it was correct at that time; that these papers were served on me, I did not know but what it was correct; that was what the paper showed on the face, that they were the owners of the note, and that they sold the fertilizers, and what did I know any better than to do that, any gentleman would have done it under the circumstances.

Q. At that time was there any question raised by anybody as to the ownership of this note by the V. C. C. Co.?

A. None whatever at that time.

COURT: Was he sued by McCall?

WITNESS: No, sir, the V. C. C. Co., and that is why I made that affidavit as I did, generally we sign the paper, and the attorney draws it out and says it is correct.

COURT: That is a matter of argument.

Mr. SMYTHE:

Q. Where do you live?

A. In Darlington.

Q. What do you do?

A. Farming and merchandise.

Q. Go into politics at all?

A. Yes, sir.

Mr. WILCOX: We object; while I am not quite sure that it is the greatest recommendation on earth for a man to be a member of the Legislature, I don't think in a jury case that the fact that he is a member of the Legislature has anything to do with it.

Mr. SMYTHE:

Q. Did you ship any cotton to Wilmington?
A. I did.
Q. What became of it?
A. It was seized by the Virginia-Carolina Chemical Co.
Q. Where?
A. It was shipped to Sprunt and Son, shipped by E. Kirven through instead of me.
Q. How many bales were taken away from you?
A. 70.
Q. How much did those bales weigh on an average?
A. About 580 lbs., I suppose, nearly 600 at the average.
Q. Do you recollect about what day they were taken?
A. About the 2nd of December.

Mr. WILCOX: We object to that; under the record of the case in Wilmington, we submit that it would be incomp-tent to go
153 into the valuation, making us responsible for valuation of cotton when no cotton has ever been attached.

Mr. Smythe submits there is a conflict in the record on this point; the part of the record which he put in shows that the cotton was attached.

Court permits Mr. Smythe to proceed.

Mr. SMYTHE:

Q. What was about the value of that cotton?

Mr. Wilcox objects because counsel is asking about a proceeding in North Carolina, because he has alleged the proceeding in his answer and the proceeding is introduced.

COURT: That is the best evidence as to what was done there, the record itself.

Mr. SMYTHE: I am asking now what was the value of that cotton on or about the 2nd of December, 1898.

WITNESS: It was worth about 6½ cts. a pound, bales averaged about 580, something like that.

Cross-examination.

Mr. WILCOX:

Q. When Mr. McCall on the 17th of Feb., 1898, wrote you: "I have conferred with my house in regard to supplying you with fertilizers," did you have any anxiety to know what house he was referring to?
A. Why, no, I did not know what house he was getting it from; I knew he was getting it from a house.
Q. How long had you been farming?
A. A long time.

Q. Don't you know every year, when you buy fertilizers, what house you are buying it from?

A. No, I do not.

Q. Don't you know whether you buy it from the Virginia-Carolina Chemical Co., or Armour, or some independent concer-?

A. When I buy it direct from the company I do.

Q. You pay no attention to that, however, when you buy from an individual?

A. When I buy from an individual he attaches a certain analysis, and I take it for granted it is right; the analysis must come on the sacks, and that is all I care for; I buy from a great many people and never know where it comes from until I see the brand on the sacks.

Q. You made an affidavit that you bought these goods from the V. C. C. Co. through S. M. McCall, as agent, and gave to S. M.
154 McCall this note for $2,298.00 and a lien security?

A. Yes, sir.

Q. Is it not a fact that you have testified time and again, and made this assertion——

Mr. SMYTHE: State the time, place and circumstances.

Mr. WILCOX:

Q. In the taking of the testimony at Darlington, S. C., before Mr. J. L. Mickey, notary public, in the Wilmington case, in the office or wherever we took it, in the city of Darlington, was not your testimony to this effect: that the cotton went to Wilmington, N. C., had been sold by you at your home place to your brother, E. E. Kirvin?

A. True.

Q. And he paid you cash therefor?

A. Yes.

Q. Then that E. E. Kirven sold the cotton to Sprunt and Son, to his agent, Mr. McCoy?

A. True.

Q. That Mr. McCoy gave a draft for it?

A. Yes.

Q. That Mr. McCoy shipped the cotton to Wilmington, as the cotton of Sprunt?

A. Did.

Q. And the attachment in Wilmington was the attachment on the proceeds of that cotton?

A. Not on the cotton.

Q. All of that is correct that you have sworn?

A. That was the testimony.

Q. All up to sending the cotton to Mr. McCoy and his giving a draft?

A. No, I told you E. E. Kirven.

Q. That E. E. Kirven sold it to McCoy, agent of Sprunt, and McCoy gave a draft for it and the cotton was shipped to Wilmington to McCoy, and the draft was given to E. E. Kirven by McCoy, that right?

A. Yes, sir.

Q. During the summer of 1898 at Darlington, S. C., in the town,

did not you talk to Mr. C. S. McCullough and tell him that these were V. C. C. Co. goods that you used?

A. Probably it might have been brought to my attention through Mr. McCall about the time this note was becoming due, and there begun to be a great fuss all over the neighbourhood about that cotton, and he went himself, and if he did not he had agents to go——

Mr. Wilcox objects to those answers as not responsive to his questions.

Q. Did not you tell Mr. C. S. McCullough during the summer——

Mr. Smythe submits that he is entitled to tell the circumstances under which the remark was made.

COURT: He is under cross-examination now; you can bring it out later; Mr. Wilcox is within his right in asking that the wit-
155 ness should answer his question and reserve any explanations for his own counsel.

WITNESS: I could not tell you positively when that happened, to save my life, or whether it happened at all, but it is perfectly natural that the V. C. C. Co. was mentioned some time in the fall.

Q. Prior to the maturity of the note?

A. I don't know about that, whether it was after or before, I could not tell you.

Q. Prior to the suit?

A. I could not tell you when that was, because I don't think there was any fuss made until after the suit had commenced, or about the time I refused to pay the note; that is about the time the disturbance commenced that created so much excitement, and I could not say, it might have been mentioned before about the V. C. C. Co., I don't know.

Mr. Wilcox states that his only object in asking that question is that the witness stated that he did not know anything about the V. C. C. Co. until after the commencement of the suit.

Q. If at Darlington, S. C., in the summer of 1898, long before the maturity of the note and long before any suit, if he did not state to Mr. McCall that he bought these goods from the V. C. C. Co?

A. No, I did not know the V. C. C. Co. then in existence.

Q. Have you ever bought any goods from the V. C. C. Co. before?

A. If I did I did not know it.

Q. You did not know that the V. C. C. Co. was in existence?

A. No, I did not; it did not go in that name in the State here that I heard anything about.

Mr. SMYTHE:

Q. When did you first know of the V. C. C. Co. in connection with this transaction with Mr. McCall?

A. When this suit was brought.

Q. Mr. Wilcox has asked you about your selling this cotton to E. E. Kirven and E. E. Kirven selling it to McCoy, and McCoy's draft, draft on Sprunt, was that draft ever paid?

A. No.

Q. Did you or not have to make good to E. E. Kirven for the loss of that 70 bales of cotton?

A. Yes, sir.

Mr. Wilcox objects as having nothing to do with the case.

WITNESS: If you allow me to tell what actually occurred you would not have any trouble. When they seized this cotton in Wilmington they thought they were seizing cotton under a lien,
156 and I had to show that this cotton was fairly and squarely paid for, and I had no fear, for the bank had already paid this draft; I says, don't have any fear of Major McCall, he will take up the draft, and I telegraphed Sprunt to hold the cotton——

COURT: That is not competent.

Mr. SMYTHE:

Q. You never got any account of that 70 bales of cotton?

A. No, sir.

Under stipulation Mr. Smythe introduced the following as a part of the testimony, by Mr. P. H. Puller, Superintendent of Berkeley Fertilizer Company in 1898:

Plaintiffs have the right to object to any part as irrelevant.

Q. You were with the Berkeley Company in 1898?

A. Yes, sir.

Q. That was a branch of the Virginia-Carolina Chemical Co.?

A. Yes, sir.

—. What is the V. C. C. Co. engaged in?

A. It is a corporation doing fertilizer business.

Q. Controlling a great many plants, does it?

A. Yes, sir.

Q. How many other plants did you have in Charleston at that time belonging to the V. C. C. Co.?

A. They have added to their works since; I may be mistaken, as to the number at that time, but I think there were the Ashley, Wando, Stono, Atlantic, Chicora, Wappoo, and the Berkeley.

Q. The only factory you were conversant with at the time was the Berkeley?

A. Yes, sir.

Q. You were superintendent of the Berkeley Co.?

A. Yes, sir.

Q. Did you superintend the shipment of any goods to Mr. Kirven?

A. Under my supervision, yes.

Q. Did you?

A. I superintended the shipments, yes.

Q. Did you know what goods were shipped to him?

A. Yes, sir.

Q. In whose sacks were they shipped?

A. In Travers and Company's sacks.

Q. Why was that?

A. We get our orders for shipment through our main office, and, of course, we have the brands of the other branches and we ship the goods according to the office.

Q. About how many thousand tons did you ship from the Berkeley Mills that year?

A. I forget what it was that year, we did ship 60,000 tons one year; I do-'t remember whether it was that year or the year before
157 or after; the capacity of the plant is 60,000 and we usually run it to its capacity.

Mr. SMYTHE: In accordance with the court's ruling this morning, that we should indicate such parts of the records that were introduced into evidence that we should especially rely upon, we will ask the stenographer to take down the following papers as constituting parts of that record:

1. Summons and complaint.

Mr. WILCOX: We object because our friends ought to know that that is not part of the record.

Mr. Smythe submits that he took the envelope and asked counsel if that was the record, and he told him it was; these are the records of the court at Darlington.

Mr. WILCOX: Absolutely not a part of the record; it is a different suit entirely.

COURT: It is not part of the record in that case?

Mr. WILCOX: Not the slightest; the record before the court is the record of the foreclosure of a lien on property.

Defendants states that these papers all constitute the record No. 4556, of the Court of Common Pleas in Darlington County.

Mr. WILCOX: Record 4556 is a special proceeding to foreclose an agricultural lien in the Circuit Court.

Court rules that it is not a part of the record, but will hear counsel as to whether it is admissible on other grounds.

Defendant offers in evidence original summons and complaint in the suit of the Virginia-Carolina Chemical Co. against J. P. Kirven, signed by R. L. Dargan and Wilcox & Wilcox, Plaintiffs' Attorneys filed in the office of the Clerk of the Court of Common Pleas in Darlington County, Nov. 15, 1898; and offers the same in evidence as an admission of the plaintiff in a record, offering to prove the handwriting of the parties signing thereto.

COURT: It appearing that this summons and complaint which was served on Nov. 16, 1898, was discontinued by order of the court on Nov. 30, 1898, before any answer was filed, it seems to the court that that record is not admissible.

Defendant offers warrant to seize crop under lien dated 23rd December, 1898; also affidavit upon which that is based, affida-
158 vits of Mr. R. L. Dargan dated 16th Dec. 1898, which is part of that record, and the affidavit of Mr. S. M. McCall dated on the same day—on the 15th of December, 1898.

These papers are admitted by the court.

Copy Lien.

THE STATE OF SOUTH CAROLINA:

Memorandum of Agreement, made this 14th day of March, A. D., 1898, between S. M. McCall of Florence, S. C., cotton buyer and dealer in fertilizers, and J. P. Kirven, of Darlington county, planter:

S. M. McCall agrees to advance to the said J. P. Kirven fertilizers to the amount of twenty-two hundred and ninety-eight dollars for agricultural purposes to be employed in the cultivation of the plantation in Darlington County owned by the said J. P. Kirven and known as "The Home place," the said J. P. Kirven having given his note of even date herewith for the said sum of twenty-two hundred and ninety dollars, payable on the 25th day of October, after the date thereof at any bank in Darlington, S. C.

And the said J. P. Kirven, hereby agrees that the said S. M. McCall shall have a lien for said advances, and the interest due thereon, on all crops made on the said plantation during the year 1898 in accordance with and subject to the provisions of the laws of the State of South Carolina.

Witness our hands and seals the day and year first above written.

S. M. McCALL. [L. S.]
J. P. KIRVEN. [L. S.]

Sealed and delivered in the presence of:
J. S. BURCH,
E. S. HOWLE.

Probated. Recorded March 17th, 1898.

Copy Note.

$2,298.00. DARLINGTON, S. C., *March 14th*, 1898.

On Oct. 25th next, after date, I promise to pay to the order of S. M. McCall twenty-two hundred and ninety-eight dollars at any bank in Darlington, S. C.

Valued received.
(Signed) J. P. KIRVEN.

Due Oct. 25th.

159 Endorsed: S. M. McCall: Pay to the order of S. M. McCall: For collection for account of Virginia Carolina Chem. Co., S. W. Travers & Co., Branch. Pay to Bank of Darlington. S. M. McCall.

Written on face: Protested for non-payment Oct. 28th, 1898. Fees 85 cents.

(Signed) M. T. LIDE,
Not. Pub. S. C.

Affidavit of R. L. Dargan.

THE STATE OF SOUTH CAROLINA,
Darlington County:

Before me W. Albert Parrott, Clerk of the Court of Common Pleas and General Sessions for said County and State, personally appears R. L. Dargan, who on oath says that he is one of the attorneys for Virginia-Carolina Chemical Company, representing said company for the purpose of collecting an amount due it by J. P. Kirven; that one S. M. McCall made advances to said J. P. Kirven for agricultural purposes during the current year, taking a lien on the crop to be raised on the plantation in Darlington County, owned by J. P. Kirven, and known as the "Home Place," during the year 1898, to secure the amount due for said advances, a copy of which lien is hereto appended; that subsequent to the time of the execution of said lien by J. P. Kirven and S. M. McCall, said S. M. McCall assigned all his rights under said lien for value to Virginia-Carolina Chemical Company, which said company is now the owner of said lien and entitled to all amounts due thereunder; that twenty-two hundred and ninety-eight dollars, with interest thereon from the 25th day of October, 1898, at seven per cent. per annum, and eighty-five cents protest fees, is now justly due on said lien, and that said J. P. Kirven has disposed of large parts of crops subject to said lien, and is about to dispose of all of said crops and to defeat the said lien to the great injury of the Virginia-Carolina Chemical Company, as deponent is informed and believes from admissions of said J. P. Kirven to him and from the facts stated in affidavits hereto appended.

Wherefore he prays that warrant may issue to seize the said crop.

R. L. DARGAN.

Sworn to before me this 16th day of December, A. D., 1898.

W. ALBERT PARROTT,
C. C. P. and G. S. for Darlington County.

160 *Affidavit of S. M. McCall.*

STATE OF SOUTH CAROLINA,
County of Florence:

Personally appeared before me S. M. McCall, who being duly sworn, says that he made, during the year 1898, advances of supplies to one J. P. Kirven, who was then employed or about to engage in the cultivation of the soil on a certain plantation in Darlington County, described by said Kirven as the "Home Place," and owned by him, to the amount of twenty-two hundred and ninety-eight dollars to be used during the said year 1898, in the cultivation of said plantation and that to secure the payment of the amount to become due for said advances he took from said J. P. Kirven a lien on all crops to be raised on the said plantation during the year 1898; that

subsequently he transferred for value said lien to Virginia-Carolina Chemical Company; that said company, during the month of October, 1898, sent to him, the said lien for collection and that it was placed with bank of Darlington for collection, together with note representing the amount due thereon; that after the 25th day of October, 1898, the day when said Kirven had agreed to pay said advances the said lien was returned to him by said Bank of Darlington, unpaid; that no part of the said amount has been paid and there is now due for said advances by the said J. P. Kirven to the Virginia-Carolina Chemical Company twenty-two hundred and ninety-eight dollars with interest from the 25th day of October, 1898, at seven per cent. per annum, and eighty-five cents protest fees; that deponent is informed and believes from the facts stated in the affidavits hereto attached, that said J. P. Kirven has disposed of the larger part of the crop subject to said lien, and that he is about to dispose of the balance of said crop and to defeat the said lien.

S. M. McCALL.

Sworn to before me this 15th day of December, 1898.

F. L. WILCOX, [L. S.]
Notary Public.

Warrant of Attachment.

THE STATE OF SOUTH CAROLINA,
Darlington County:

Whereas the Virginia-Carolina Chemical Company having given the undertaking required by law:

161 To the Sheriff of Darlington County:

You are hereby required and commanded, without delay, to seize the crop of J. P. Kirven in your County covered by the lien for agricultural advances executed by J. P. Kirven to S. M. McCall and transferred by S. M. McCall to the Virginia-Carolina Chemical Company, a copy of which is hereto attached, and after due notice to sell the same for cash, and out of the net proceeds thereof, or of so much thereof as may be necessary to pay over to the Virginia-Carolina Chemical Company the sum of twenty-two hundred and ninety-eight dollars with interest thereon at seven per cent. per annum from the 25th day of October, 1898, and eighty-five cents protest fees, in extinguishment of the amount due on said lien.

Witness my hand and seal the 23rd day of December, A. D., 1898.

W. ALBERT PARROTT,
C. C. C. P. and G. S. for Darlington County.

Defendants close.

In Reply.

C. S. McCULLUGH recalled.

By Mr. WILCOX:

Q. I asked Mr. Kirven when he was on the stand if he did not tell you sometime during the summer of 1898 at Darlington, S. C., before the maturity of the note in the fall, and before any suit was brought, that he had purchased fertilizers that year from the V. C. C. Co., and he said no, he did not.

A. I would like to ask when the note was due and then I can tell you whether it was before or after.

Q. October.

A. In the month of July, as well as I can judge, July or August, before cotton had matured Mr. Kirven told me that he bought that goods from the V. C. C. Co.

Q. At Darlington, S. C.?

A. In Mr. R. W. Boyd's office.

Cross-examination.

Mr. SMYTHE:

Q. What is your relation to the Virginia-Carolina Chemical Co.?

A. Just now?

Q. What was it then?

A. I had no connection with them whatever.

Q. What is it now?

A. I was in competition with them.

Q. What is it now?

A. I have none whatever.

Q. You have no connection with the V. C. C. Co.?

A. No, sir.

162 Q. How did this conversation come about?

A. Mr. Kirven asked me to go up to Mr. Boyd's office and look at some cotton that he had up there.

Q. Did you go?

A. Yes, sir.

Q. What was there in the cotton to look at?

A. He had some green stalk cotton up there he wanted me to see.

Q. Was there anything special, extra fine cotton, or anything?

Mr. Wilcox objects and submits that counsel can draw out anything with relation to this conversation, but on cross examination he can't call for irrelevant matter which is out of the complaint.

Mr. SMYTHE: I want to know why it was that Mr. Kirven volunteered this remark to Mr. McCullough.

Q. What was your answer? What was there in the condition of the cotton that brought about this statement of Mr. Kirven's that he got this stuff from the V. C. C. Co.?

A. Well, he had some cotton there that had a peculiar look and he wanted to know what I thought about it.

Q. And in the course of that conversation——

A. He told me he bought it from the V. C. C. Co.

Q. How do you fix that date as July?

A. I know from the condition of the plant there that I saw there, July or August I said, it was before the cotton plant had fully matured.

Q. That is six years ago?

A. Yes, sir.

Q. Seven years ago?

A. Yes, sir.

Q. You remember positively it was July or August?

A. I remember the condition of the cotton and I know that cotton is in that state in July and August.

Q. Are you not manager of the Southern Cotton Oil Works in Darlington?

A. Yes, sir.

Q. Is not that a branch of the V. C. C. Co.?

A. No, sir.

Q. No connection between it, the Pedee Cotton Oil Company and the Southern Cotton Oil Company, don't you know that the V. C. C. Co. and the Southern Cotton Oil Company are practically one?

A. No, sir, I know they are practically two.

Q. And have no connection between them? Why, the V. C. C. Co. owns stock in the Southern Oil Company.

A. I don't think they own it all, no, sir, in fact I can swear that they don't own my company at Darlington, they do not own the Pedee Oil and Ice Company which I represent.

163 Q. Is that the Cotton Oil Company you represent?

A. Yes, sir.

Q. You have no connection with the Southern Cotton Oil Co.? Did not you tell me just now you were connected with the Southern Cotton Oil Co.? Are you or are you not connected with the Southern Cotton Oil Company?

A. I am connected with the Pedee Oil and Ice Co., I am the manager.

Q. You are not connected with the Southern Cotton Oil Co?

A. That has an interest in the Pedee Oil and Ice Co., that is our connection.

Q. Did not you tell me just now you were connected with the Southern Cotton Oil Company?

A. Well, I am connected in that way; they are some of the stockholders of the Southern Cotton Oil Company, and I think a majority of the stock of the Pedee Ice and Oil Company is owned by the stockholders of the Southern Cotton Oil Company, but it is a separate corporation and not working under the same charter.

Q. Managed by the Southern Cotton Oil Company?

A. Yes, sir, and stockholders of the Southern Cotton Oil Company the controlling interest in the Pedee Oil and Ice Company.

Q. And they manage it and control it, don't they?
A. Yes, sir.

S. M. McCALL, recalled.

By Mr. WILCOX:

Q. It was stated by Mr. Kirven in substance that you told him that if he did not pay this note you would have to pay it.
A. Yes, sir, I heard him say that.
Q. What do you say about that?
A. I say I told Mr. Kirven that it would ruin me and I naturally supposed that he inferred that I meant that I would never get to pay it, but what I meant by that, I was just talking about fertilizer business and I said it would ruin my reputation with the company and other people if he did not pay for the goods and I tried to get him to pay it.

Cross-examination:

Q. Well, then, you did tell him that, that it would ruin you if he did not pay the note?
A. Yes, sir, but I meant it in that way.
Q. But why did you say you did not tell him that when you were cross-examined this morning?
A. I did not say that.
Q. I laid the foundation, why did you say that this morning?
A. Well, sir, it is a different question; when I told him it
164 would hurt me I did not mean financially, but I gave Mr. Kirven credit for inferring that, that is what he might have inferred.

Mr. Smythe reads affidavit of Mr. R. L. Dargan, then leading counsel for the plaintiff in this proceeding when they sought to foreclose.

Mr. Wilcox submits that that suit has been discontinued.

COURT: Yes, but it is a part of the suit which they introduced.

Defendants submits that with the additional evidence that is in they have a right again to ask the court to instruct a verdict for the defendant.

The court states that it will submit the question to the jury.

Defendants ask- leave to file the following grounds:

"And now comes the defendant and at the close of the testimony in this case, moves the court to direct a verdict in favor of the defendant for the following reasons:

1. Because under the judiciary act of the United States, no Circuit Court shall have cognizance of any suit * * * in favor of any assignee of other subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

Under this rule it is the duty of the plaintiff to show jurisdiction, and to show either that the assignor S. M. McCall, the original payee of the note possessed the requisite citizenship to maintain the action in this court, or that the said S. M. McCall never had a cause of

action against the defendant, and therefore by his endorsement of the note did not in fact assign or transfer any right of action.

Whereas, it is respectfully submitted that the uncontradicted testimony of McCall himself, a witness for the plaintiff, shows that the note of the defendant in question was taken by McCall to secure himself, and was not the property of the plaintiff company until transferred by McCall to it. That therefore the suit could not have been brought by the company without the endorsement of S. M. McCall, and inasmuch as S. M. McCall is a citizen of South Carolina, as is also the defendant, J. P. Kirven, this court has no jurisdiction and the verdict must be for the defendant.

165 2. Because it appears from the undisputed evidence in the record that the note sued on herein was dated March 14th, 1898. That at that time the plaintiff, the Virginia-Carolina Chemical Co., was doing a large fertilizer business in the State of South Carolina. That it had not complied with the provisions of the general law of South Carolina as now collated in Chapter 44 of the Civil Code of South Carolina of 1902. The uncontradicted evidence shows that the first effort on part of the plaintiff to comply with those laws was made in the year 1900, more than 60 days after doing business in this State.

That the statutes of this State forbid any foreign corporation from doing business herein without complying with the terms of such chapter, making the doing of such business a criminal offense, and the company liable to indictment, and upon conviction thereof to a fine.

Such chapter further provides that it shall be unlawful for any such foreign corporation so to do business.

That therefore, if it be held that the contract was made between the defendant and the present plaintiff, then it was a contract made by a foreign corporation, the Virginia-Carolina Chemical Co. being a citizen of the State of New Jersey, which had not complied with the statutory conditions enabling it to do business in South Carolina, and it therefore cannot maintain this action."

Motion is heard and overruled.

Mr. Wilcox: I have no request to charge, except on what I conceive to be the one point in the case; I will ask your Honour to charge the jury that if they find S. M. McCall was the agent of this company in this transaction, then they shall find that the V. C. C. Co. is such an owner of the note as gives it a right to sue as a foreign corporation in the United States Court.

I will ask your Honour to charge, second, that the statute which our friend has introduced as denying the right of the V. C. C. Co. to do business in this State was passed after this transaction, and, therefore, is not applicable. It does not apply, and if the statute was of the effect that he states that it denies the V. C. C. Co. to do business in this State, unless they comply with the laws in filing the papers, then if they did not file the papers, that would not give a party dealing with them a right to have his private contract declared void.

I will also ask your Honour to charge, third, that if the V. C. C.

Co. attached in North Carolina, not the cotton, but the proceeds of cotton which had already been sold by Kirven and sent to
166 Wilmington, then the credit that Kirven is entitled to is limited to such part of the proceeds as the court in Wilmington, N. C., rendered judgment for Kirven.

Judge's Charge.

Mr. FOREMAN AND GENTLEMEN: The court is requested by the learned counsel for the defendants to give you certain instructions:

First. The jury are charged that this is an action brought by the Virginia-Carolina Chemical Co., a corporation created by and existing under the laws of the State of New Jersey, against the defendant, J. P. Kirven, a citizen of the State of South Carolina, based upon a promissory note dated March 14th, 1898, payable to the order of S. M. McCall for twenty-two hundred and ninety-eight ($2,298.00) dollars, at any bank in Darlington. This note was endorsed by S. M. McCall to the Virginia-Carolina Chemical Co. That company claims in its complaint that a note was given to and received by S. M. McCall solely as agent for this plaintiff, to whom the same belonged, and that he never had any beneficial interest in said note; that the beneficial owner when it was made, was and still is the plaintiff, all of which was known at the time to the defendant.

The jurisdiction of this court is created and limited by Acts of Congress. Under this law, this court is forbidden to have cognizance of any suit upon a promissory note, in favour of any assignee or other subsequent holder, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

It is admitted in the testimony that S. M. McCall is a citizen of the State of South Carolina, as is the defendant, J. P. Kirven. If, therefore, the note ever belonged to S. M. McCall or he at any time had any beneficial interest in it, which ownership or interest was transferred by him to the plaintiff company, then as the plaintiff company would claim such ownership or interest in the said note by virtue of said assignment and as McCall the original payee could not sue this note in this court, being a citizen of the same State as defendant, then this court is without jurisdiction, and the verdict must be for the defendant.

In other words, if the jury find from the evidence that S. M. McCall took this note from the defendant to secure himself and that it remained his property until he afterwards transferred it to the company, then the interest of the company being created by and
167 through the assignment or endorsement of this note by McCall to Kirven, the court is without jurisdiction because the suit *b*ould not have been originally brought by McCall against Kirven, and the verdict must be for the defendant.

COURT: The court gives you that instruction; it will add afterward certain instructions of its own, present the facts in alternative form, but that instruction correctly states the law.

Second. The jury are further charged that the suit in this action is brought on a note of the defendant dated 14th of March 1898; that the Virginia-Carolina Chemical Company is a foreign corporation created under the laws of the State of New Jersey; that the Statutes of South Carolina prescribe certain conditions precedent, which must be performed by foreign corporations before it shall be lawful for them to do business in South Carolina. These conditions require them to file within sixty days after acquiring any property or commencing to do business in this State, a written stipulation or declaration in due form, designating some place within the State as the principal place of business or place of location of said corporation in this State, at which all legal papers may be served on said corporation, by a delivery of the same to an officer, agent or employee of said corporation found therein, or if none such be found, then by leaving copies of the same on the premises; and that such service shall have like force and effect in all respects as served upon citizens within this State and found within the limits of the same. Other conditions of the statute law, already stated, require said corporations to file in the office of the Secretary of State, together with a written stipulation or declaration aforesaid, copies of their charter and by-laws with all amendments of the same that may from time to time be made within sixty days from the *the* date of making the sale.

In addition thereto, said corporations are required to file annually in the office of the Secretary of State, on or before the 31st day of January, a statement sworn to by some officer of the corporation, showing the resident- and post office address of such corporation, the amount of the capitol stock of the same actually paid, and the names of the president and secretary if there be any such and the board of directors, with their respective places of residence and post office addresses.

The said statutes provide that any such corporation failing to file any of the papers, shall be liable to indictment for such failure, and upon the conviction, shall be fined a sum not exceeding five hundred ($500.00) dollars; and the statutes further provide that it
168 shall be unlawful for any such foreign corporation to do business in this State, without first complying with the requirements of this chapter.

The paper of the character described filed by the plaintiff, the Virginia-Carolina Chemical Company, as produced by the Secretary of State, commenced in 1900.

If therefore the jury find from the evidence that the plaintiff, the Virginia-Carolina Chemical Company, failed within sixty days after March 14th, 1898, the date of this transaction, to file in the office of the Secretary of State, the papers so required by the statute law to be therein filed, then it is unlawful for it to do business in South Carolina, the plaintiff cannot maintain the action, and the verdict must be for the defendant.

COURT: Court refuses that instruction; that is that owing to alleged failure of the Virginia-Carolina Chemical Co. to file some papers in the office of the Secretary of State, it has no right to sue.

The court has already decided that there is nothing in that objection and that if it has failed to comply that does not deprive it of its rights to effect this suit.

Third. The jury are further instructed that the defendant, by way of counter-claim in this action, sets up that on or about the 1st day of December, 1898, the plaintiff attached and took into its possession in the city of Wilmington, seventy (70) bales of short staple cotton, the property of the defendant, and of the average weight of 500 pounds per bale and has appropriated the proceeds thereof to its own use; that the said seventy (70) bales of cotton weighed 35,000 pounds, and reasonably worth the sum of 7 cents per pound, making the total value of the said cotton so seized and appropriated by the plaintiff to its own use, the sum of twenty-four hundred and fifty ($2,450.00) dollars.

Wherefore the defendant demands judgment against the plaintiff in the sum of twenty-four hundred and fifty ($2,450.00) dollars, with interest at the rate of seven (7) per cent. per annum from the 1st of December, 1898.

If therefore the jury find from the evidence that the facts set up in the counter-claim are true and that the plaintiff has seized and converted to its own use the seventy (70) bales of cotton therein mentioned and that the value thereof is as therein set forth, then the defendant is entitled to judgment against the plaintiff in the sum claimed or in whatever sum the jury may find to be a fair value of the said cotton.

COURT: The court gives you that instruction if you find those to be the facts.

169 Fourth. The jury are further charged that if they find from the evidence that the defendant is indebted to the plaintiff in the amount of the note sued on in this case, but they further find that the plaintiff has converted to its own use seventy (70) bales of cotton belonging to the defendant, then the jury are authorized and are so instructed to allow interest, on the value of the said cotton from the date of its conversion and to deduct the amount of the note with interest from the value of said cotton with interest, and find a verdict for the plaintiff or defendant, for the balance which appears, on making up such an account.

COURT: The court gives you that instruction.

This case will be submitted to you to determine the facts, the one main fact, is for you to determine from the testimony which you have heard, and the court will not undertake to repeat that testimony; it probably is fresh in your recollections and it would serve no good purpose to state what the testimony was on one side or on the other. It will confine itself to stating what the law is that should govern, and you have to determine from that testimony the true nature of the transaction between McCall and Kirven, the defendant:

If you find that McCall was a dealer in fertilizers and that he bought the fertilizers, sold them to Kirven, taking his note therefor, and subsequently assigned the note to the plaintiff company from

which he had bought the fertilizers, you should find for the defendant, for upon that state of facts this court is without jurisdiction.

If you find that the fertilizers were sold to Kirven by the Virginia-Carolina Chemical Co. in pursuance of the contract made by McCall, and that McCall, in said transaction, was the broker or agent of the plaintiff company and that the note given to McCall was solely for the benefit of the Virginia-Carolina Chemical Co., and that McCall had no beneficial interest in it, the note being made payable to him simply for the sake of convenience, then it follows that the plaintiff has the right to sue in this court, and it would be your duty to find for the plaintiff the amount now due upon the note.

If you find that McCall was beneficially interested in the note to the extent of his commissions and that he had the right to hold the same until such commissions were paid and to sue on it to recover his commissions, then it would follow that he had such a beneficial interest in the note as would deprive this court of jurisdiction in the suit of the assignee.

If you find that the note was given and taken for the
170 benefit of the Virginia-Carolina Chemical Co., and that McCall's commissions were payable by that company and that he had to look to that company for the same and therefore had no right to hold the note or to sue on it, then the fact that he was entitled to commissions on the amount of the note would not deprive this court of its jurisdiction, and if you find that to be the true state of facts it would be your duty to find for the plaintiff the amount due.

If you find from the testimony that the plaintiff company attached the proceeds of the sale of cotton in Wilmington in the hands of Sprunt and Co. and not the cotton itself, then it would follow that the credit to be allowed would be the amount received in those attachment proceedings and not the value of the cotton.

Defendants enter exception to court's refusal to grant the second request. Also to the fourth paragraph of the judge's charge, on the ground that there is no evidence at all of the facts that the commissions were payable by the company, and therefore there is no foundation for that charge.

It is stipulated between counsel for plaintiffs and defendant that the technicalities in preparing any assignment of errors on appeal on either side be made, and that thirty days be allowed either side for the preparation of such assignments of error. It is further stipulated that so far as counsel are agreed they will waive any objections to exceptions being taken to the judge's charge by counsel for the plaintiff.

Complaint Filed in State Court November 15, 1898.

STATE OF SOUTH CAROLINA,
Darlington County:

Court of Common Pleas.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Duly Chartered and Incorporated under the Laws of the State of New Jersey, Plaintiff,

against

J. P. KIRVEN, *Defendant.*

Suit on Note (Complaint).

The plaintiff herein complaining alleges:

I. That at the times hereinafter referred to, the plaintiff, Virginia-Carolina Chemical Company, was, and now is and has been ever since, a corporation duly chartered and incorporated under the laws of the State of New Jersey, with its principal office in the City of Richmond, Virginia.

II. That, at Darlington, S. C., on the 14th day of March
171 A. D., 1898, the defendant J. P. Kirven made and delivered to one S. M. McCall his certain promissory note in writing and thereby promised to pay on Oct. 25th, 1898, to the order of said S. M. McCall, twenty-two hundred and ninety-eight dollars at any bank in Darlington, S. C., value received.

III. That thereafter the said S. M. McCall duly endorsed said note for value to Virginia-Carolina Chemical Company, plaintiff herein.

IV. That said note was duly presented for payment on the day of its maturity, at bank of Darlington, in Darlington, S. C., and payment thereof was refused, and said note was thereupon protested for non-payment at a cost to this plaintiff of eighty-five cents, which amount this plaintiff has been compelled to pay.

V. That plaintiff is now the owner and holder of said note and no part of the amount due thereon has been paid by discount or otherwise, and there is now due and remaining unpaid thereon by the defendant J. P. Kirven to the plaintiff, Virginia-Carolina Chemical Company, the sum of twenty-two hundred and ninety-eight dollars, with interest from the 25th day of Octobe-, 1898, at seven per cent. per annum, and the further sum of eighty-five cents for protest fees.

Wherefore plaintiff demands judgment against the defendant J. P. Kirven, in the sum of twenty-two hundred and ninety-eight dollars with interest thereon from the 25th day of October, 1898, at seven per cent. per annum, and for the further sum of eight-five cents protest fees and such other and further relief as may be just.

R. L. DARGAN,
WILLCOX & WILLCOX,
Plaintiff's Attorneys.

STATE OF SOUTH CAROLINA,
Darlington County:

Personally appeared before me R. L. Dargan, who being duly sworn, says he is one of the attorneys for the plaintiff in the above stated action; that said action is founded on a written instrument for the payment of money only, and such instrument is now in his possession and that the allegations of the above complaint are true of his own knowledge; that the reason why he makes this affidavit is that the plaintiff is a corporation out of the County of Darlington and there is no officer of said corporation in the County of Darlington.

R. L. DARGAN.

172 Sworn to before me this 16th day of November, A. D., 1898.

[L. S.] W. ALBERT PARROTT,
Clerk of Court D. C.

Summons Filed in State Court November 15, 1898.

THE STATE OF SOUTH CAROLINA,
County of Darlington:

Court of Common Pleas.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation under the Laws of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

To the Defendant, J. P. Kirven:

You are hereby summoned and required to answer the complaint in this action, of which a copy *os* herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers at their offices in Darlington or Florence, S. C., within twenty days after the service hereof; exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

R. L. DARGAN,
WILLCOX & WILLCOX,
Plaintiff's Attorneys.

Dated Florence, S. C., Nov. 15th, A. D., 1898.

Endorsements: State of South Carolina, County of Darlington, Court of Common Pleas. Virginia-Carolina Chemical Company, Plaintiff, against J. P. Kirven, Defendant. Summons & Complaint for Relief. R. L. Dargan, Willcox & Willcox, Plaintiff's Attorneys. Original. Filed Nov. 15th, 1898. W. Albert Parrott, Clerk of Court D. C.

173 *Sheriff's Certificate of Service.*

VIRGINIA-CAROLINA CHEM. CO.
vs.
J. P. KIRVEN.

STATE OF SOUTH CAROLINA,
County of Darlington:

I hereby certify that on the 16th day of November, A. D., 1898, at his residence in Darlington County, I served on the above named J. P. Kirven the summons and complaint in this action, by delivering copies thereof to him personally, and leaving the same with him at his residence in Darlington County, South Carolina.

G. P. SCARBOROUGH,
Sheriff D. C.

Clerk's Certificate.

STATE OF SOUTH CAROLINA,
County of Darlington:

I, W. Albert Parrott, clerk of court in and for the County of Darlington, State aforesaid, do hereby certify that the within is a true and correct copy of the summons and complaint and the endorsements thereon and the certificate of service upon the defendant J. P. Kirven, now on file in my office in the case of Virginia-Carolina Chemical Co. *vs.* J. P. Kirven, Judgment Roll No. 4556.

Witness my hand and seal this 4th day of May, A. D., 1905.

[SEAL.] W. ALBERT PARROTT,
Clerk of Court D. C.

Affidavit.

STATE OF SOUTH CAROLINA,
Darlington County:

Court of Common Pleas.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Duly Chartered under the Laws of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

Suit on Note. Affidavit.

STATE OF SOUTH CAROLINA,
Florence County:

Personally appeared before me P. A. Willcox, who being sworn, says, that he is one of plaintiff's attorneys and that no answer, de-

murrer or notice of appearance has been received by plain-
174 tiff's attorney in this action and that plaintiffs are desirous of discontinuing the cause heretofore commenced against the defendant.

P. A. WILLCOX.

Sworn to before me this 30th day of November, A. D., 1898.
S. W. G. SHIPP, [L. S.]
Notary Public in & for South Carolina.

Order Discontinuing Suit in State Court.

STATE OF SOUTH CAROLINA,
Darlington County:

Court of Common Pleas.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Duly Chartered under the Laws of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

Suit on Note. Order.

It appearing to the court that an action was commenced by the plaintiff against the defendant by the service of summons and complaint on the defendant on the —— day of November, 1898, and that no answer, demurrer or notice of appearance has yet been received by plaintiff's attorneys,

On motion of Willcox & Willcox, R. L. Dargan, attorneys for plaintiff,

It is ordered that the said cause of action be discontinued and the summons and complaint dismissed at the cost of plaintiff and without prejudice to the right of plaintiff to commence another suit at such time as they may be advised.

Further ordered that a copy of this order be forthwith served on the defendant.

R. C. WATTS,
Presiding Judge.

November 30th, 1898.

The jury thereupon found a verdict for the plaintiff in the sum of $911.07.

A judgment thereon was duly entered up.

Thereafter the defendant through his counsel moved the court for a new trial of the above case on the following grounds, to-wit: (See grounds for motion for new trial.)

After hearing the argument of counsel for both sides, the court made an order refusing the motion for a new trial. (See opinion refusing motion for a new trial.)

To the granting of such order, the defendant duly excepted, and his exception is allowed.

175 Inasmuch as the aforesaid judgment appearing by the verdict of the jury, and the defendant by his counsel prayed that this bill of exceptions be allowed and the prayer of his petition has been granted, the time for drawing, signing and sealing the same having been extended by counsel.

WM. H. BRAWLEY, [L. S.]
U. S. Judge.
August 3, 1905.

Agreed to:

A. T. S.
H. A. M. S.

Assignment of Errors.

Filed August 3, 1905.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth Circuit.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

To the Honorable the Judge of the Circuit Court for the District of South Carolina:

The defendant, by his counsel, respectfully assigns the following errors to the rulings and decisions of his Honor, Wm. H. Brawley, the presiding judge, during the progress of the trial of the above stated cause and the refusal of his Honor, the presiding judge, to grant a new trial in such cause, to-wit:

1. Because it is respectfully submitted that his Honor, the presiding judge erred in refusing the motion of the defendant that a non-suit should be entered in the cause, on the grounds stated, to-wit:

"And now comes the defendant and at the close of the plaintiff's testimony in this case, moves the court to order an non-suit in favor of the defendant for the following reasons:

1. Because under the judiciary act of the United States, no Circuit Court shall have cognizance of any suit * * * in favor of any assignee of other subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

176 Under this rule it is the duty of the plaintiff to show jurisdiction, and to show either that the assignor S. M. McCall, the original payee of the note, possessed the requisite citizenship to maintain the action in this court, or that the said S. M. McCall never had a cause of action against the defendant, and therefore by his endorsement of the note did not in fact assign or transfer any

right of action, and that plaintiff had a right of action without such endorsement.

Whereas, it is respectfully submitted that the uncontradicted testimony of the plaintiff, including that of McCall himself, a witness for the plaintiff, shows that the note of the defendant in question was taken by McCall, the original payee, to secure himself, and was not the property of the plaintiff company until transferred by McCall to it. That therefore the suit could not have been brought by the company without the endorsement of S. M. McCall, and inasmuch as the testimony shows that S. M. McCall is a citizen of South Carolina, as is also the defendant, J. P. Kirven, this court has no jurisdiction and the verdict must be for the defendant.

2. Because it appears from the undisputed evidence in the record that the note sued on herein was dated March 14th, 1898. That at that time the plaintiff, the Virginia-Carolina Chemical Co., a corporation of the State of New Jersey, was doing a large fertilizer business in the State of South Carolina. The plaintiff's testimony failed to show that it had complied with the provisions of the general law of South Carolina as now collated in Chapter 44 of the Civil Code of South Carolina of 1902.

That the statutes of this State forbid any foreign corporation from doing business herein without complying with the terms of such chapter, making the doing of such business a criminal offense, and the company liable to indictment, and upon conviction thereof to a fine.

Such chapter further provides that it shall be unlawful for any such foreign corporation so to do business.

That therefore, if it be held that the contract was made between the defendant and the present plaintiff, then it was a contract made by a foreign corporation, the Virginia-Carolina Chemical Co. being a citizen of the State of New Jersey, and the plaintiff having failed to show that it has complied with the statutory conditions enabling it to do business in South Carolina, which constitute conditions precedent to the lawful conduct of such business, it therefore cannot maintain this action."

177 II. Because it is respectfully submitted that his Honor, the presiding judge, erred in refusing to allow the defendant to introduce into testimony the original summons and complaint in the suit of the Virginia-Carolina Chemical Company against F. P. Kirven, signed by R. L. Dargan and Willcox & Willcox, plaintiff's attorneys, filed in the office of the Clerk of the Court of Common Pleas, Darlington County, Nov. 15th, 1898, as an admission of the plaintiff in a record; the defendant then and there offering to prove the handwriting of the parties signing thereto.

III. Because it is respectfully submitted that his Honor, the presiding judge, erred in refusing the motion of the defendant made at the close of the case, to instruct a verdict for the defendant upon the following grounds, to-wit:

"And now comes the defendant and at the close of the testimony in this case, moves the court to direct a verdict in favor of the defendant for the following reasons:

1. Because under the judiciary act of the United States, no Circuit Court shall have cognizance of any suit * * * in favor of any assignee of other subsequent holder * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

Under this rule it is the duty of the plaintiff to show jurisdiction, and to show either that the assignor, S. M. McCall, the original payee of the note, possessed the requisite citizenship to maintain the action in this court, or that the said S. M. McCall never had a cause of action against the defendant, and therefore by his endorsement of the note did not in fact assign or transfer any right of action.

Whereas, it is respectfully submitted that the uncontradicted testimony of McCall himself, a witness for the plaintiff, shows that the note of the defendant in question was taken by McCall to secure himself, and was not the property of the plaintiff company until transferred by McCall to it. That therefore the suit could not have been brought by the company without the endorsement of S. M. McCall, and inasmuch as S. M. McCall is a citizen of South Carolina, as is also the defendant, J. P. Kirven, this court has no jurisdiction and the verdict must be for the defendant.

2. Because it appears from the undisputed evidence in the record that the note sued on herein was dated March 14th, 1898.
178 That at that time the plaintiff, the Virginia-Carolina Chemical Co., was doing a large fertilizer business in the State of South Carolina. That it has not complied with the provisions of the general law of South Carolina as now collated in Chapter 44 of the Civil Code of South Carolina of 1902. The uncontradicted evidence shows that the first effort on the part of the plaintiff to comply with those laws was made in the year 1900, more than 60 days after doing business in this State.

That the statutes of this State forbid any foreign corporation from doing business herein without complying with the terms of such chapter, making the doing of such business a criminal offense, and the company liable to indictment and upon conviction thereof to a fine.

Such chapter further provides that it shall be unlawful for any such foreign corporation so to do business.

That, therefore, if it be held that the contract was made between the defendant and the present plaintiff, then it was a contract made by a foreign corporation, the Virginia-Carolina Chemical Co., being a citizen of the State of New Jersey, which had not complied with the statutory conditions enabling it to do business in South Carolina, and it, therefore, cannot maintain this action."

IV. Because it is respectfully submitted that his Honor the Presiding Judge erred on refusing to charge the second request to charge submitted by the defendant, on the following words, to-wit:

"Second. The jury are further charged that the suit in this action is brought on a note of the defendant dated 14th of March 1898; that the Virginia-Carolina Chemical Company is a foreign corporation created under the laws of the State of New Jersey; that the Statutes of South Carolina prescribe certain conditions precedent, which must

be performed by foreign corporations before it shall be lawful for them to do business in South Carolina. These conditions require them to file within sixty days after acquiring any property or commencing to do business in this State, a written stipulation or declaration in due form, designating some place within the State as the principal place of business or place of location of said corporation in this State, at which all legal papers may be served on said corporation, by a delivery of the same to any officer, agent or employee of said corporation found therein, or if none such be found, then by leaving copies of the same on the premises; and that such service shall have like force and effect in all respects as served upon citizens within this State and found within the limits of the same.

179 Other conditions of the statute law, already stated, require said corporations to file in the office of the Secretary of State, together with a written stipulation or declaration aforesaid, copies of their charter and by-laws with all amendments of the same that may from time to time be made within sixty days from the *the* date of making the sale.

In addition thereto, said corporations are required to file annually in the office of the Secretary of State, on or before the 31st day of January, a statement sworn to by some officer of the corporation, showing the resident and post office address of such corporation, the amount of the capitol stock of the same actually paid, and the names of the directors, with their respective places of residence and post office addresses.

The said statutes provide that any such corporation failing to file any of the papers, shall be liable to indictment for such failure, and upon the conviction, shall be fined a sum not exceeding five hundred ($500.00) dollars; and the statutes further provide that it shall be unlawful for any such foreign corporation to do business in this State, without first complying with the requirements of this chapter.

The paper of the character described filed by the plaintiff, the Virginia-Carolina Chemical Company, as produced by the Secretary of State, commenced in 1900.

If therefore the jury find from the evidence that the plaintiff, the Virginia-Carolina Chemical Company, failed within sixty days after March 14th, 1898, the date of this transaction, to file in the office of the Secretary of State, the papers so required by the statute law to be therein filed, then it is unlawful for it to do business in South Carolina, the plaintiff cannot maintain the action, and the verdict must be for the defendant.

COURT: Court refuses that instruction; that is that owing to alleged failure of the Virginia-Carolina Chemical Co. to file some papers in the office of the Secretary of State, it has no right to sue. The court has already decided that there is nothing in that objection and that if it has failed to comply that does not deprive it of its rights to effect this suit."

V. Because it is respectfully submitted that his Honor the Presiding Judge erred in charging the jury as follows, to-wit:

"If you find that the note was given and taken for the benefit of the Virginia-Carolina Chemical Co., and that McCall's commissions

were payable by that company and that he had to look to that
180 company for the same and therefore had no right to hold the note or to sue on it, then the fact that he was entitled to commissions on the amount of the note would not deprive this court of its jurisdiction, and if you find that to be the true state of facts it would be your duty to find for the plaintiff the amount due."

Whereas, it is respectfully submitted that there was no evidence at all, showing or tending to show, that McCall's commissions were payable by the company and that he had to look to the company for the same and, therefore, had no interest in the note authorizing him to hold it or to sue on it, and, therefore, it is respectfully submitted that the paragraph of the charge herein excepted to, was based simply on hypothesis and not on testimony and tended to mislead the jury.

VI. Because it is respectfully submitted that his Honor the Presiding Judge erred in refusing the motion for a new trial made upon the following grounds and duly argued before him to-wit:

"1. Because it is respectfully submitted that his Honor the Presiding judge erred in overruling the motion for a non-suit, and also the motion to direct a verdict in favor of the defendant, and also in refusing to charge the second request submitted by the defendant, inasmuch as the uncontradicted testimony showed that the plaintiff, a foreign corporation, had failed to comply with the provisions of the Statute Law of the State of South Carolina allowing foreign corporations to do business within its boundaries, and, therefore, could not maintain this action, such failure constitutes a bar to plaintiff's right to recover herein.

2. Because it is respectfully submitted that his Honor the Presiding Judge erred in refusing to allow the defendant to introduce as testimony in his behalf the original summons and verified complaint in the case of the Virginia-Carolina Chemical Company signed by R. L. Dargan and Willcox & Willcox, plaintiff's attorneys, in the office of the clerk of the Court of Common Pleas for the County of Darlington, on 15th November, A. D., 1898, and served on the defendant on 16th November, A. D., 1898.

3. Because it is respectfully submitted that the verdict in this case was without testimony to support it, and in direct contravention to the undisputed testimony introduced in behalf of the plaintiff itself, and to the charge of his Honor the Presiding Judge.

4. Because it is respectfully submitted that his Honor the Presiding Judge erred in the fourth paragraph of the original
181 charge delivered by him to the jury in this case, inasmuch as there was no evidence whatever on which such charge could be based, and, therefore, it was hypothetical and tended to mislead the jury."

Whereas it is respectfully submitted that both as a matter of law and because the testimony is *suspected* of but one construction, a new trial should be granted on the grounds stated.

GEORGE W. BROWN,
WOODS & MACFARLAN,
W. F. STEVENSON,
SMYTHE, LEE & FROST,
Defendant's Attorneys.

Appeal Bond and Approval.

Filed August 8, 1905.

Know all men by these presents, that we, J. P. Kirven, as principal and The United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto the Virginia-Carolina Chemical Company in the full and just sum of eleven hundred dollars to be paid to the said Virginia-Carolina Chemical Company, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of August in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of the United States for the District of South Carolina, in a suit depending in said court, between The Virginia-Carolina Chemical Company, plaintiff, against J. P. Kirven, defendant, a judgment was rendered against the said J. P. Kirven and the said J. P. Kirven having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Virginia-Carolina Chemical Company, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if the said J. P. Kirven shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the
182 above obligation to be void; else to remain in full force and virtue.

J. P. KIRVEN, [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By H. S. BAIRD, *Gen'l Agt.*
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By GEO. W. BROWN, *Attorney in Fact.*

Sealed and delivered in presence of:

E. O. WOODS.
C. D. EVANS.

Approved by—

C. J. MURPHY,
C. C. C. U. S. Dist. S. C.

Aug. 8, 1905.
By order of Court Aug. 1, 1905.

Order for Clerk to Approve Appeal Bond in Absence of Judge.

Filed August 1, 1905.

THE UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court. Fourth Circuit.

VIRGINIA-CAROLINA CHEMICAL COMPANY
vs.
J. P. KIRVEN.

Whereas owing to the possibility of the Presiding Judge of this court being absent from the State when the appeal bond in this case is given,

Ordered, that in such event the clerk of this court be, and he is hereby, authorized to approve the form and sufficiency of the said bond.

August 1, 1905.

WM. H. BRAWLEY,
U. S. Judge.

183 *Order Allowing Writ of Error.*

Filed August 3, 1905.

THE UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth Circuit. At Law

VIRGINIA-CAROLINA CHEMICAL COMPANY
vs.
J. P. KIRVEN.

It is ordered, that the writ of error prayed for by the defendant, J. P. Kirven, be allowed as prayed for, and that a citation do issue in accordance therewith.

Further ordered, that the defendant file a bond within thirty days from this order, with sureties to be approved by one of the judges of this court, in the sum of eleven hundred dollars, conditioned that the said defendant shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then above obligation to be void; else to remain in full force and virtue.

August 3, 1905.

WM. H. BRAWLEY,
U. S. Judge.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Virginia-Carolina Chemical Company, plaintiff, and J. P. Kirven, defendant, a manifest error hath happened, to the great damage of the said defendant J. P. Kirven as by his his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the —— next, in the said Circuit Court of
184 Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of August, in the year of our Lord one thousand nine hundred and five.

C. J. MURPHY,
Clerk of the Circuit Court of the United States, Dist. of South Carolina.

Allowed by—
WM. H. BRAWLEY,
U. S. Judge.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Virginia Carolina Chemical Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the —— pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of South Carolina, wherein J. P. Kirven is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Brawley, United States Judge for Dist. S. C., this 3rd day of August, in the year of our Lord one thousand nine hundred and five.

WM. H. BRAWLEY,
U. S. Judge.

Service accepted this 23 Aug., 1905.

MITCHELL & SMITH,
For Va. Ca. Chem. Co.

185 *Affidavit for Continuance.*

Filed April 6, 1904.

UNITED STATES OF AMERICA,
District of South Carolina, in the Fourth Circuit:

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
against
J. P. KIRVEN, Defendant.

STATE OF SOUTH CAROLINA,
County of Darlington:

Before me personally appeared E. O. Woods and Geo. W. Brown, who being duly sworn say that they are each Counsel for the defendant, J. P. Kirven, in the case above stated, and in the defense of said case there will be from twenty to thirty witnesses, who reside in the Counties of Darlington and Florence. That it would be a great hardship to force the defendant to take all of these witnesses to the City of Charleston for the trial of this case when all of them reside within a short distance of the Town of Florence, none of them residing more than sixteen miles therefrom. That a great number of these witnesses are poor people, and it will be necessary, as deponents are informed and believe, for the defendant to pay their way to Charleston and return, which will be a burden and hardship upon him. That it will be more for the convenience of both counsel and witnesses and in furtherance of justice that said case be continued at the approaching term of this Court in Charleston so that it may be tried at Florence at the next terms of this Court to be there held.

186 Wherefore deponents ask that this case be continued from the said term at Charleston to the next term of the Court at Florence.

GEO W. BROWN.
E. O. WOODS.

Sworn to before me this 2nd day of April, 1904.

[SEAL.]

W. ALBERT PARROTT,
Clerk of Court, D. C.

187 *Affidavit of W. Albert Parrott.*

Filed April 11, 1904.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

Before me personally appeared W. Albert Parrott, who being duly sworn says that he is Clerk of the Court of Common Pleas for the County of Darlington, and that in said Court was tried an issue between the above named plaintiff and above named defendant involving the right of the plaintiff to enforce an agricultural lien against the crops of the defendant for the purchase price of certain fertilizers, the purchase price of which is evidenced by a note, as deponent is informed and believes, upon which the above suit is based, said issue resulting in a verdict for the defendant. That as Clerk of Court deponent was called upon to tax the costs of defendant's witnesses who attended the Court for the defense, and he taxed and allowed the costs of all the mentioned in the affidavit of Geo. W. Brown and E. O. Woods and the affidavit of J. P. Kirven, except J. W. Ferguson, Dick Moody, Marion Rollins, M. S. Haynsworth, T. W. Jones, T. B. Haynsworth, and Dr. T. H. McLeod, for the reason that while deponent was satisfied as they were among the list of defendant's witnesses it was not satisfactorily proven on the hearing to tax costs which was resisted by the plaintiff that these
188 witnesses were actual attendants but that they were subject to the call of the defendant to be notified when needed.

W. ALBERT PARROTT.

Sworn to before me this April 7, 1904.

JAMES R. COGGESHALL, (L. S.)
Not. Pub. S. C.

189 *Affidavits of E. O. Woods & Geo. W. Brown.*

Filed April 11, 1904.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

THE VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
against
J. P. KIRVEN, Defendant.

Personally appeared before me Geo. W. Brown and E. O. Woods, who being duly sworn say that they are each of counsel for the defendant, J. P. Kirven, in the case above stated, and that the following is the list of witnesses for the defense in this case: O. D. Lee, H. J. Nettles, W. L. Flowers, W. C. Gandy, A. L. Flowers, T. L. Garrison, G. H. Caraway, J. F. McLaurin, T. H. McCoy, L. K. Kirven, E. E. Kirven, T. E. Kirven, Frank Wall, Lewis Dargan, P. C. Beck, A. C. Spain, J. W. Ferguson, J. W. Woodham, G. P. Scarborough, J. T. Sumner, A. A. Gandy, J. A. Russell, Jim Moody, Dick Moody, R. H. Bryant, S. J. Odom, A. W. Sexton, D. C. Reynolds, P. P. Chambers, Marion Rollins, W. J. Rollins, Samuel Odom, C. H. Powe, Walker Powe, Will Sumner, W. D. Williams, Jim W. Goodson, P. R. Rhodes, W. S. Hatchell, Dwight Harrington, J. C. Dove, J. O. DuRant, Jr., T. B. Haynsworth, Dr. F. H. McLeod, R. C. Commander, T. W. Jones. That all of said witnesses reside either in the County of Darlington or Florence, except J. F. McLaurin who resides in the County of Marlborough, none of them residing as deponents are informed and believe, except McLaurin, more than sixteen miles from the Town of Florence, and all of them except McLaurin can drive by buggy to Florence just as they are accustomed to attend the County Court, and thus the great
190 expense of travelling more than one hundred miles to Charleston will be avoided. These deponents know of their own knowledge that it would be a great hardship upon the defendant to require him to carry the witnesses to the City of Charleston, and such a course would render it impracticable for him to make such defense as he would otherwise be able to so.

E. O. WOODS.
GEO. W. BROWN.

Sworn to before me this April 7, 1904.

[SEAL.] W. ALBERT PARROTT,
Clerk of Court, D. C.

191 *Affidavit of J. P. Kirven.*

Filed April 11, 1904.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

THE VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Chartered by and under the Laws of the State of New Jersey, Plaintiff,

against

J. P. KIRVEN, Defendant.

Before me personally appeared J. P. Kirven, who being duly sworn says that he is the defendant in the above stated case, and that the following is the list of witnesses who will be subpœnaed in the trial of the case above stated, and that each and all of them can and will testify to matters material to his defense in this case: O. D. Lee, H. J. Nettles, W. L. Flowers, W. C. Gandy, A. L. Flowers, T. L. Garrison, G. H. Caraway, J. F. McLaurin, T. H. McCoy, L. K. Kirven, E. E. Kirven, T. E. Kirven, Frank Wall, Lewis Dargan, P. C. Beck, A. C. Spain, J. W. Ferguson, J. W. Woodham, G. P. Scarborough, J. T. Sumner, A. A. Gandy, J. A. Russell, Jim Moody, Dick Moody, R. H. Bryant, S. J. Odom, A. W. Sexton, D. C. Reynolds, P. P. Chambers, Marion Rollins, W. J. Rollins, Samuel Odom, C. H. Powe, Walker Powe, Will Sumner, W. D. Williams, Jim W. Goodson, P. R. Rhodes, W. S. Hatchell, Dwight Harrington, J. C. Dove, J. O. DuRant, Jr., T. H. Haynsworth, Dr. F. H. McLeod, R. C. Commander, T. W. Jones. That it would be a great hardship upon deponent to require the trial of this case in Charleston owing to the large number of witnesses, and the great expense which would be imposed upon him, and it would be im-
192 practicable for him to carry to Charleston the witnesses who should be carried to make out his defense in a satisfactory manner. That all the said witnesses will drive in buggies to Florence just as they attend their County Court, and their attendance will be a matter of small expense and thus deponent will be enabled to have at Court such witnesses as are necessary to make proof of his defense. That the above is a list of witnesses for the defense at a trial between deponent and the plaintiff in this case involving the plaintiff's right to enforce an agricultural lien given to secure the note sued on in this case for certain fertilizers, which trial resulted in a verdict for the defendant. And this deponent asks that, in the interest of justice, this case be continued from the term of Court at Charleston to the next term at Florence.

J. P. KIRVEN.

Sworn to before me this April 7, 1904.

[SEAL.] W. ALBERT PARROTT.
Clerk of Court, D. C.

193 *Notice and Affidavit of Geo. W. Brown.*

Filed April 12, 1904.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

Notice.

To Messrs. Willcox & Willcox, and Mitchell & Smith, plaintiff's attorneys:

Please take notice that on the within affidavit we shall move before this honorable Court at the Court House on Monday, the 11th inst., at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order allowing the defendant to amend his answer herein in order to set up the facts contained in the said affidavit.

GEO. W. BROWN,
STEVENSON & MATHESON,
WOODS & MACFARLAN,
Defendant's Attorneys.
SMYTHE, LEE & FROST,
Of Counsel.

194 UNITED STATES OF AMERICA,
District of South Carolina:

In the Fourth Circuit.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
against
J. P. KIRVEN, Defendant.

STATE OF SOUTH CAROLINA,
County of Darlington:

Before me personally appeared Geo. W. Brown who being duly sworn says that he is one of the counsel of the defendant, J. P. Kirven, in the above stated action.

That the plaintiff herein brought suit against the defendant in Wilmington, North Carolina, several years since on the same note which is the cause of action in this case, and that in such and under such proceedings they attached in the City of Wilmington one hundred bales of cotton, claiming all of said cotton to be the property of the defendant, J. P. Kirven. That said defendant, J. P. Kirven, never appeared in that suit, was not served personally, and that no

personal judgment was ever obtained against him which could be enforced except as against the said attached property.

That after a prolonged litigation in which E. E. Kirven appeared as claimant of the cotton, a trial was finally had, as deponent is informed and believes, which resulted in a verdict by the jury and the application by the Court that seventy bales of the cotton belonged to J. P. Kirven, defendant herein, and was applicable to the
195 claim of the Virginia-Carolina Chemical Company, and that said judgment was rendered in North Carolina before the institution of the present suit in Charleston.

Deponent is further informed and believes that notice of appeal from said judgment was given in said action which notice was pending at the time the answer herein was prepared, but that said notice of appeal has been withdrawn, a fact which deponent and his associate counsel for defendant have just learned, and that Seventeen Hundred Dollars has either been applied or is in the Court in Wilmington, North Carolina, applicable to the debt which is claimed to be represented by the note sued on herein, the costs having been taxed, as deponent is informed and believes, against E. E. Kirven and taken from his part of the money.

That deponent and his associate counsel deem it essential and necessary that the answer of the defendant should be amended by setting up these facts, and that the failure to set them up in the original answer was due to no fault on the part of deponent or his associates, but solely for the reasons above stated. That, as above averred, deponent and his associates have just been informed that said notice of appeal from the judgment above mentioned has been withdrawn or abandoned.

Wherefore deponent asks that leave be granted to file an amended or supplemental answer in this case, setting up the facts hereinbefore recited.

GEO. W. BROWN.

Sworn before me this 2nd day of April, 1904.

[SEAL.] W. ALBERT PARROTT,
Clerk of Court D. C.

196 STATE OF SOUTH CAROLINA,
County of Darlington:

E. O. Woods, one of the associate counsel in this case, says that he has read the foregoing affidavit of Geo. W. Brown, Esq., and he is informed from reliable sources that the facts therein stated are true and correct.

E. O. WOODS.

Sworn to before me this 2nd day of April, 1904.

[SEAL.] W. ALBERT PARROTT,
Clerk of Court D. C.

197 *Order for Leave to File Supplemental Answer.*

Filed April 12, 1904.

THE UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

On motion of Defendant's Attorneys, Plaintiff's Attorneys being present and heard.

Ordered that Defendant herein have leave within twenty (20) days from this date to file such additional or supplemental answer or counterclaim in the case as he may be advised is proper, a copy of which shall, within such period, be served on Plaintiff's Attorneys. The Plaintiff to have twenty days thereafter to reply is so advised.

Provided nothing herein contained shall prejudice any right of the plaintiff to contend that the matters set up by the defendant in pursuance of this order were matters which should have been set up only by way of Supplemental Answer and with no greater force than is so set up.

WM. H. BRAWLEY,
U. S. Judge.

April 12, 1904.

197½ *Exhibit in Evidence, March* 16, 1905.

5715.

VIR. CAR. CHEMICAL CO.
vs.
J. P. KIRVEN.

Willcox, Bellamy & Bellamy, Rountree & Carr.
Davis & Davis, J. D. Bellamy.

Judgment for $2298.85 against J. P. Kirven with interest from 28th Oct., 1898, at 7 per cent. per annum and against Alex. Srpunt & Sons $1723.40 the value of 70 bales of cotton attached herein in their hands found to be the property of J. P. Kirven with interest thereon from 2 day of December, 1898, to be applied to debt of J. P. Kirven.

Clerk	22.60
Sup. Court	.50
Sheriff, McRae	3.60
" Hewlett	4.00
" Stedman	.60
Jury Tax	9.00
Notary Public Grainger	.25
Witnesses	
Advertisement	10.50
Commissioner	
Execution	
Justice Cost	
Transcript	
Advanced Costs	10.00

Judgment Roll File 13th April, 1903.

Seventeen hundred, twenty three & 40/100 principal, Five hundred, Seventy one & 59/100 Dollars and Fifty-one & 05/100 Costs, Total Twenty Three Hundred, fifty six & 04/100 Dollars paid into office this 17th June, 1904.

Received payment Twenty two hundred, ninety four and 99/100 principal and interest and ten (10) dollars advanced Costs.

198 Total $2304.99 Rountree & Carr Attorneys for Virginia Carolina Chemical Co.

This June 28, 1904, Received (9.00) Nine Dollars Jury Tax H. McL. Green Treas.

Rec'd $3.60 my fees W. G. McRae.

Rec'd 60 cents my fees J. H. Taylor, Jr. D. S.

Rec'd 10.50 Advertisement Wilmington Messenger by J. W. Jackson.

Rec'd 60 c. bal. my fees Elijah Hewlett.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, John D. Taylor, Clerk of the Superior Court of the County and State aforesaid, do hereby certify, that the foregoing contains a full, true, and perfect transcript of the Judgment, in a civil action lately pending in said Court, between Virginia Carolina Chemical Company, Plaintiff and J. P. Kirven, Defendant.

In Attestation whereof I have hereunto signed my name, and affixed the Seal of said Court, at Office in Wilmington, this 28th day of February A. D. 1905.

[Official Seal.] JNO. D. TAYLOR,
Clerk Superior Court, New Hanover County.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, O. H. Allen, Judge of the Superior Court, of the County and State aforesaid, do hereby certify, that John D. Taylor whose name is signed to the foregoing certificate, is now, and was at the time of

signing the same, Clerk of the Superior Court for said County, and that his attestation is in due form. Given under my hand this 1st day of March, 1905.

O. H. ALLEN,
Judge Superior Court, Fifth Judicial District.

199 STATE OF NORTH CAROLINA,
County of New Hanover:

I, John D. Taylor, Clerk of the Superior Court, of the County and State aforesaid, do hereby certify that O. H. Allen whose name is subscribed to the foregoing certificate, is now, and was at the time when he subscribed the same, Judge of the said Superior Court duly commissioned and qualified, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto signed my name and affixed my seal of office, at Office in Wilmington, this — day of March, 1905.

[Official Seal.]

JNO. D. TAYLOR,
Clerk of the Superior Court of New Hanover County.

200 EXHIBIT IN EVIDENCE, MARCH 16, 1905.

STATE OF NORTH CAROLINA,
County of — Hanover:

Be it remembered, that on the first day of December 1898 Virginia Carolina Chemical Company sued and prosecuted out of the Superior Court of New Hanover County a summons in these words:

"STATE OF NORTH CAROLINA,
New Hanover County:

Superior Court.

VIRGINIA CAROLINA CHEMICAL COMPANY, a New Jersey Corporation,
Plaintiff,
against
J. P. KIRVEN, Defendant.

The State of North Carolina to the Sheriff of New Hanover County, Greeting:

You are hereby commanded to summon J. P. Kirven to appear at the next term of said Court, to be held at the Court House in Wilmington, on the 6th Monday before the first Monday of March 1899 it being the 23rd day of January 1899 to answer to Complaint of said Plaintiff. If the Defendant shall fail to appear at the time, the plaintiff will apply for the relief demanded in the complaint, together with costs of this action.

Of this summons make due return to the Clerk of said Court for the County of New Hanover.

Given under my hand this 1st day of December 1898.

JNO. D. TAYLOR,
Clerk Superior Court New Hanover County.

And thereupon the Sheriff of New Hanover County made the following return on said summons to-wit:

To hand Dec. 1st, 1898. The Defendant not to be found in New Hanover County.

E. HEWLETT, *Sheriff*,
By W. W. KING, *D. S.*

201 And thereupon the following Attachment papers were issued with return of said Sheriff of said County as the same appears on the back of said Attachment papers.

STATE OF NORTH CAROLINA,
New Hanover County:

Superior Court.

VIRGINIA CAROLINA CHEMICAL COMPANY, a New Jersey Corporation,
Plaintiff,
against
J. P. KIRVEN, Defendant.

Affidavit.

F. L. Willcox one of the Attorneys for Plaintiff above named, being duly sworn, deposes and says:

1. That the Defendant J. P. Kirven is indebted to the Plaintiff in the sum of Twenty two hundred & ninety eight Dollars, with interest thereon from Oct. 25th 1898, at seven per cent. per annum, and eighty five cents protest fees—on a promissory note, date Mc'h 14th 1898, signed by said J. P. Kirven, payable to order of S. M. McCall and endorsed over by said S. M. McCall to Plaintiff.

2. That the said Plaintiff is about to commence an Action in this Court against the said Defendant, and has issued Summons therein that the said Defendant is a non-resident of the State of North Carolina and that he resides in the County of Darlington, in the State of South Carolina.

F. L. WILLCOX.

Sworn to and subscribed before me, this 1st day of December, 1898.

JNO. D. TAYLOR,
Clerk Superior Court.

202 STATE OF NORTH CAROLINA,
New Hanover County:

Superior Court.

VIRGINIA CAROLINA CHEMICAL COMPANY, a New Jersey Corporation,
against
J. P. KIRVEN.

Undertaking upon Attachment.

Whereas, the Plaintiff above named is about to apply for a warrant of attachment against the property of the above named defendant:

Now, therefore we, Virginia Carolina Chemical Co., J. S. Armstrong of New Hanover County, and C. E. Borden of New Hanover County, undertake in the sum of Forty six hundred dollars, that if the said Warrant be granted, and the Defendant recover judgment in this action, or the attachment be set aside by order of the Court, the plaintiff shall pay all costs that may be awarded to Defendant in the same, and all damages which he may sustain by reason of such attachment.

VIRGINIA CAROLINA CHEMICAL COMPANY. [L. S.]
By WILLCOX & WILLCOX, *Att'ys in Fact.*
JOHN S. ARMSTRONG.
C. E. BORDEN.

Signed and Delivered in the presence of me, this 1st day of December 1898.

JNO. D. TAYLOR,
Clerk Superior Court.

STATE OF NORTH CAROLINA,
New Hanover County:

Justification of Sureties.

On this first day of December 1898 before me personally appeared Jno. S. Armstrong and C. E. Borden to me known to be the persons who executed the foregoing bond, and personally acknowledged that they did execute the same.

And the said J. S. Armstrong, being duly sworn says that he is a resident and free holder in New Hanover County, and worth double the amount of foregoing bond exclusive of property exempt from execution, and over and above liabilities.

JNO. D. TAYLOR,
Clerk Superior Court.

203 New Hanover County, Superior Court.

VIRGINIA CAROLINA CHEMICAL COMPANY, a New Jersey Corporation,
against
J. P. KIRVEN.

Warrant of Attachment.

State of North Carolina, to any Constable or other Lawful Officer of said County, Greeting:

It appearing by affidavit, to the undersigned, that a cause of action exists in favor of the Plaintiff against the Defendant for the sum of Twenty two hundred and ninety eight Dollars with interest thereon from Oct. 25th 1898, at seven per cent. per annum and eightly five cents protest fees and that the Defendant is a non-resident of the State of North Carolina, residing in Darlington County, State of South Carolina, and the Plaintiff having given the undertaking required by law:

Now, therefore, you are commanded to forthwith *to* attach and safely keep all the property of the said Defendant, J. P. Kirven, in your County, or so much there*fo* as may be sufficient to satisfy the Plaintiff's demand, with cost and expenses; and have you this warrant before our Superior Court on the sixth Monday before the first Monday in March 1899 with your proceedings thereon.

Witness our said Clerk, this 1st day of December 1898.

JNO. D. TAYLOR,
Clerk Superior Court.

VIRGINIA CAROLINA CHEMICAL COMPANY
against
J. P. KIRVEN.

Attachment.

Received Dec'r 1st 1898, at 12-55 o'clock P. M. Defendant not to be found in New Hanover County. Delivered a copy of this warrant
Notice and Summons to Garnishee to James Sprunt of *of*
204 Alex Sprunt & Son and levied upon all the funds or proceeds of Cotton in the hands of Alex Sprunt & Son belonging to the Defendant.

E. HEWLETT,
Sheriff New Hanover County.
By W. W. KING, *D'y Sh'ff.*

And thereupon the said Virginia Carolina Chemical Company by its Attorneys came and complained as follows:

STATE OF NORTH CAROLINA,
County of New Hanover:

Superior Court, January Term, 1899.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation, Plaintiff,
vs.
J. P. KIRVEN, Defendant.

Complaint.

The Plaintiff complaining of the Defendant Alleges:

I. That the Plaintiff is a corporation organized under the laws of the State of New Jersey, with its principal office in the City of Richmond, State of Virginia, and that the Defendant is a resident of the State of South Carolina.

II. That the Defendant is endebted to the Plaintiff in the sum of twenty two hundred and ninety eight Dollars with interest thereon from the 25th day of October A. D. 1898 at seven per cent. per annum and eighty five cents protest fees, evidenced by a promissory note in words and figures as follows:

$2298.00. DARLINGTON, S. C., *Mch 14th*, 1898.

On Oct. 25th next after date I promise to pay to the order of S. M. McCall Twenty Two Hundred and ninety eight Dollars at any Bank in Darlington, S. C. Value received.

(Signed) J. P. KIRVEN.

(Across face of note in red ink:)
Protested for non payment Oct. 28th .98. Fees 85c.
(Signed) M. T. LIDE,
Not. Pib. S. C.

Endorsed as follows: S. M. McCall.

205 that the said note had been duly transferred and endorsed by S. M. McCall to the Plaintiff as shown above.

III. That Plaintiff has demanded of the Defendant the payment of said note and interest and defendant has refused to pay the same.

Wherefore the Plaintiff prays judgment against the defendant.

I. For the sum of Twenty two hundred and ninety eight and 85/100 Dollars with interest according to the complaint.

II. For the costs of this action to be taxed by the Clerk.

III. For such other and further relief as to the Court shall seem just and according to law.

P. B. MANNING,
WILLCOX & WILLCOX,
Counsel for Plaintiff.

STATE OF VIRGINIA,
City of Richmond,
County of Henrico:

S. W. Travers, Treasurer of the Virginia Carolina Chemical Company, personally appeared before me this day, and being first duly sworn, says that he has read the foregoing complaint and that the facts set forth therein are true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

S. W. TRAVERS, *Treasurer.*

Sworn to and subscribed before me this 29th day of December 1898.

[SEAL.] THOS. ARMSTRONG,
Notary Public.

And the said Alexander Sprunt & Son by their attorneys, came and pleaded as follows,

206 STATE OF NORTH CAROLINA:

Superior Court of New Hanover County.

VIRGINIA-CAROLINA CHEMICAL COMPANY
vs.
J. P. KIRVEN.

James Sprunt and William H. Sprunt, partners constituting and composing the firm of Alex. Sprunt & Son, having been summoned as garnishees in the above entitled action, answer and say as follows:

First. That the said firm of Alex. Sprunt & Son is not now and was not at the commencement of this action indebted to the defendant J. P. Kirven in any amount or sum whatsoever and that the said firm of Alex. Sprunt & Son, did not at the time of the commencement of this action or of the service of the attachment herein upon them have and have not now any effects whatever of the said defendant J. P. Kirven in their hands. And they further say that they do not know of any effects or debts of the said defendant there are or may be in the hands of any other or what person to the knowledge or belief of either of them. And they further say that neither the said James Sprunt or William H. Sprunt personally owe or did owe at the commencement of this action any sum of money whatsoever to the said J. P. Kirven, or have any effects of his in their hands or had any at the time of the service of the attachment herein, and that they nor either of them know what effects or debts of the defendant there are in the hands of any other or what person to their knowledge and belief.

Second. Further answering they say that some time prior to the commencement of this action they did purchase one hundred bales of cotton from one E. E. Kirven marked M. C. J., but that the

said E. E. Kirven informed them, or their agent that the said cotton was his own property and not the property of any one else,
207 and that they bought the same in good faith in open market believing the same to be the property of the said E. E. Kirven, and that they had no knowledge then and have no knowledge or belief now that the said J. P. Kirven had any interest or claim whatsoever upon the same, or that the said cotton belonged to any one but the said E. E. Kirven.

WM. H. SPRUNT.

JUNIUS DAVIS,
For Garnishees.

STATE OF NORTH CAROLINA,
County of New Hanover:

James Sprunt and William H. Sprunt being duly sworn do severally and each for himself depose and say, that the foregoing answer is true of his own knowledge except as to those matters and things therein stated on information and belief and as to those he believes it to be true.

WM. H. SPRUNT.

Sworn and subscribed to before me this 23rd day of January A. D. 1899.

——, ——.

And thereafter, at a regular term of the Superior Court of New Hanover County, begun and held on the 6th day of April 1903, with Honorable R. B. Peebles, Judge, this cause coming on for trial, and a jury having been chosen, tried, sworn and empaneled to try the issues joined between the parties, and thereupon, after the charge of the Court, said jurors heretofore empanelled in this case for their verdict found the issues submitted to them as follows:

1st. Is J. P. Kirven indebted to the Plaintiff and if so in what sum?

Answer. Yes $2298.85 and interest on 2298 from Oct. 28th 1898 at seven per cent.

2. Is the property levied upon in the attachment proceedings in the hands of Alex. Sprunt & Son or any part thereof the property of J. P. Kirven?

Answer. Yes 70 bales.

208 3. If so, what is the value thereof?

Answer. $1723.40 with interest from Deed 3rd 1898.

Whereupon the Court entered the following judgment.

New Hanover County, in the Superior Court.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff,
against
J. P. KIRVEN, Defendant.

Judgment for Plaintiff.

At a Superior Court, held at the Court House in Wilmington, on the 6th day of April, 1903.

Present: Hon. R. B. Peebles, Judge.

This Action having been brought on for hearing and a jury having been sworn and empanelled to try the following issues, to wit:

1st. Is J. P. Kirven indebted to the Plaintiff and if so in what sum?

2nd. Is the property levied on in the acctachment proceedings in the hands of Alex. Sprunt & Son or any part thereof, the property of J. P. Kirven?

3rd. If so what is the value thereof?

and the jury having responded to the 1st issue $2298.85 and interest on $2298.85 from Oct. 28th 1898 with interest at 7 per cent.—to the 2nd issue "Yes" 70 bales and to the 3rd issue $1723.40 with interest from Deed 3rd 1898.

It is Now, on motion of Rountree and Carr and Bellamy and Bellamy Counsel for the Plaintiff.

Adjudged, that the Plaintiff recover from the Defendant J. P. Kirven the sum of $2298.85 with interest from the 28th day of October 1898 at 7 per cent. per annum.

It is further adjudged that the Plaintiff recover from Alex. Sprunt & Son Seventeen Hundred and Twenty three & 40/100 Dollars the value of the 70 bales of cotton attached herein in the hands of Alex. Sprunt & Son and found by the jury to be the property of
209 the Defendant J. P. Kirven, with interest thereon from the 3rd day of December 1898 which said sum of $1723.40 and interest is to be applied when collecting the debt herein adjudged to be due by the Defendant J. P. Kirven to the plaintiff.

It is further adjudged that Alex. Sprunt & Son pay the costs of this action to be taxed by the Clerk of this Court.

R. B. PEEBLES,
Judge Presiding.

And the judgment Docket shows the following entries, Seventeen hundred, twenty three & 40/100 principal, Five hundred, Seventy one & 59/100 Dollars and Fifty one & 05/100 Costs—Total Twenty three hundred, forty six & 04/100 Dollars paid into Office this 17th June 1904.

Received Twenty two hundred, ninety four & 99/100 principal & interest and ten (10) Dollars advanced Costs Total $2304.99 Rountree and Carr attorneys for Virginia Carolina Chemical Company.

This June 20th 1904. Received (9.00) Nine Dollars jury Tax H. McL. Green Treas.

Rec'd $\#.60$ my fees W. G. McRae. Rec'd 60 cents my fees J. H. Taylor, Jr., D. S. Rec'd $10.50 advertisement Wilmington Messenger by J. W. Jackson.

Rec'd 60¢ bal my fees, Elijah Hewlett.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, John D. Taylor, Clerk of the Superior Court of the County and State aforesaid, do hereby certify that the foregoing contains a full, true, and perfect transcript of the Summons, and return of the Sheriff and Attachment papers including affidavit, undertaking and warrant and Sheriff's return, Compalint, Answer of Garnishees,
Verdict, Final Judgment, and entries on Judgment Docket
210 as to amount paid on said Judgment in a civil suit lately
pending in said Court, between Virginia Carolina Chemical Company, Plaintiff and J. P. Kirven Defendant.

In attestation whereof, I have hereunto signed my name, and affixed the Seal of said Court, at Office in Wilmington, this 6th day of March 1905.

[OFFICIAL SEAL.] JNO. D. TAYLOR,
Clerk Superior Court.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, O. H. Allen, Judge of the Superior Court of the County and State aforesaid, do hereby certify, that John D. Taylor, whose name — signed to the foregoing certificate, is now, and was at the time of signing the same, Clerk of the Superior Court for said State and County, and that his Attestation is in due form.

Given under my hand this 7th day of March 1905.

O. H. ALLEN,
Judge Superior Court, 5th Judicial District.

STATE OF NORTH CAROLINA,
County of New Hanover:

I, John D. Taylor, Clerk of the Superior Court, of the County and State aforesaid, do hereby certify that O. H. Allen, whose name is subscribed to the foregoing certificate is now, and was at the time when he subscribed the same, Judge of the Superior Court for said State and County duly commissioned and qualified, and that full faith and credit are due to his Official acts as such.

In testimony whereof I have hereunto signed my name and affixed my seal of Office, at Office in Wilmington, this 7th day of March, 1905.

[OFFICIAL SEAL.] JNO. D. TAYLOR,
Clerk Superior Court.

211 *Mandate.*

Filed April 27, 1906.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Circuit Court of the United States for the [SEAL.] District of South Carolina, Greeting:

Whereas, lately in the Circuit Court of the United States for the District of South Carolina, before you, or some of you, in a cause between Virginia-Carolina Chemical Company, a corporation created by and existing under the laws of the State of New Jersey, plaintiff, and J. P. Kirven, defendant; wherein the judgment of the said Circuit Court entered in the said cause on the 4th day of April, 1905, is in the words following, to-wit:

It is adjudged that the plaintiff, the Virginia-Carolina Chemical Company, recover of said defendant, J. P. Kirven nine hundred and eleven 07-100 dollars, so found, with sixty-three 77-100 dollars costs, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Fourth Circuit by virtue of the writ of error sued out by the said J. P. Kirven agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the term of February, in the year of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Fourth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this
212 cause, be, and the same is hereby, affirmed, with costs.

NATHAN GOFF.

May 5, 1906.

You, therefore, are hereby commanded that such further proceedings be had in said cause, by way of execution as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand nine hundred and six.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of Def't in Error.

Clerk $17.15

Endorsement: United States Circuit Court of Appeals, Fourth Circuit. No. 632. J. P. Kirven, Pl'ff in Error, *vs.* Virginia-Carolina Chemical Company, Def't in Error. Mandate. Ent. on Journal, page 110. Filed Aug. 27, 1906. C. J. Murphy, C. C. C. U. S. Dist S. C.

213 *Answer of Defendants.*

Filed November 22, 1906.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth Circuit.

VIRGINIA-CAROLINA CHEMICAL COMPANY, a Corporation Created by and Existing under the Laws of the State of New Jersey, Plaintiff,
against
J. P. KIRVEN, Defendant.

The defendant answering the complaint herein:

I. Admits the truth of the allegations contained in the second and third paragraphs of the said complaint, and admits, upon his information and belief, the truth of the allegations contained in the first paragraph thereof.

II. Has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in the sixth paragraph of the said complaint, and demands strict proof thereof.

III. Denies the truth of the allegations contained in the fifth paragraph of the complaint, with the exception of the allegation therein contained that the note sued upon was presented for payment and payment thereof declined, and that no part of said note, or the interest thereon, has ever been paid.

214 IV. Denies each and every allegation contained in the fourth paragraph of the complaint, and, on the contrary, alleges that the note sued upon was given by defendant to S. M. McCall for certain fertilizers purchased by him from the said S. M. McCall, without the slightest knowledge upon the part of the defendant of any business connection between the said S. M. McCall and the plaintiff, and this defendant never knew or had the slightest connection with the plaintiff when he contracted to buy said fertilizers evidenced by the note in suit, or when the same was given to the said S. M. McCall. Upon information and belief, the defendant alleges that the note sued upon if ever owned by the plaintiff, was assigned to the plaintiff after the execution and delivery thereof to S. M. McCall. That the said S. M. McCall and defendant were at the time of the making of said contract for the purchase of the fertilizers, and at the time of the execution and delivery of said note and the assignment of the same by the said S. M. McCall to plaintiff, and at the time of the commencement of this action, and are now

residents and citizens of the State of South Carolina, and this Court is utterly without jurisdiction in this action.

V. That the plaintiff, as alleged, is a foreign corporation and was doing business in this State at the date when the contract for the sale of fertilizers was made and when the alleged note was taken, being engaged in the manufacturing and selling of fertilizers, some of which were sold to the defendant by the said S. M. McCall without the defendant's knowledge that he was buying from the said Company, which was systematically carrying on the said business of manufacturing and selling fertilizers within the said State, and had been so doing for more than sixty days prior to the date of said sale, and the date when the said note sued upon was given for the fertilizers so bought. That the said Company, at the time of
215 making said sale and at the time of taking said note and delivery of said fertilizers, had not complied with the laws providing for filing a copy of their charter and appointing an agent in the State of South Carolina, upon whom legal papers should be served, as provided for in the laws of said State now found in Chapter 44, Vol. I of the Civil Code of South Carolina, being the revision of 1902 and adopted as the Code of laws of South Carolina of 1902, in that the plaintiff had failed to file in the office of the Secretary of State a written stipulation or declaration designating some place within this State as its principal place of business or locality at which all papers may be served on said corporation, and to file in the office of the Secretary of State copies of its charter and by-laws, with amendments of the same, or to comply with any of the other provisions of law expressly required by the Statutes of the State of South Carolina as now set out in said chapter and volume of the statute laws of South Carolina, all of which were prerequisite to the plaintiff doing any lawful business in the State, and any and all business conducted by the said plaintiff during the periods above set out was unlawful, being prohibited by the Statutes of this State, and said contract and note arising therefrom are null and void.

VI. That the note upon which this action was brought was given to S. M. McCall for fertilizers which the defendant purchased from the said S. M. McCall without knowledge that the plaintiff had any connection therewith, the price agreed upon being a sound price therefor, which fertilizers were delivered to the defendant, and used by himself partly on his own crops, and partly sold to customers for use on their crops, and were so used by himself and customers and tenants with the expectation of being largely benefited therefrom. That the said fertilizers were worthless, and there was a total
216 failure of consideration, and that defendant owes nothing on the said note to any person whomsoever.

VII. That the note sued upon in this action was given by the defendant to S. M. McCall for fertilizers, for which he agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers in making a crop for the year in which the said note was given, but the said fertilizers were so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that

instead of being of benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note.

Wherefore the defendant demands that the complaint be dismissed with costs.

GEO. W. BROWN,
STEVENSON & MATHESON,
WOODS & MACFARLAN,
Defendant's Attorneys.
SMYTHE, LEE & FROST,
Of Counsel.

Service accepted this 30th May 1903.

MITCHELL & SMITH.

The within is a true copy of the original answer in this case served on Plffs. 30th, May 1903.

SMYTHE, LEE & FROST,
For Def'ts.

217 UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth Circuit.

I, C. J. Murphy, Clerk of the United States Circuit Court for the District of South Carolina, hereby certify that the 102 pages, partly written, partly printed, partly typewritten and partly blank, contains a full and true exemplification of all the proceedings had in the Court aforesaid in a certain cause wherein Virginia-Carolina Chemical Company was plaintiff, and J. P. Kirven, Defendant, as appears by the original records remaining in my office.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Charleston, S. C., on this 22nd day of November, A. D., 1906, and in the 131st year of the Sovereignty and Independence of the United States of America.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
C. C. C. U. S. District, S. C.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

218 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

J. P. KIRVEN, Plaintiff-Respondent,
against
VIRGINIA-CAROLINA CHEMICAL COMPANY, Defendant-Appellant.

Opinion by EUGENE B. GARY, A. J.:

This is an action for damages, alleged to have been sustained by the plaintiff, as the result of using certain fertilizers in the cultivation of his crops, manufactured and sold to him by the defendant.

As the main question herein is whether the issues raised by the pleadings, had already been adjudicated in an action between the same parties, in the Circuit Court of the United States, it will be necessary to state briefly the proceedings in the two cases.

On the 15th of November 1898 the Virginia-Carolina Chemical Co. as plaintiff, filed a complaint in the Court of Common Pleas for Darlington County, State of South Carolina, against J. P. Kirven as defendant, in which it was alleged, that on the 14th of March 1898, the defendant made his certain note, whereby he promised to pay to the order of S. M. McCall $2,228.00 on the 25th of October thereafter; that the said note was endorsed for value to the plaintiff, and that no part thereof had been paid.

On the 30th November 1898 his Honor Judge Watts, on motion of plaintiff's attorneys, granted an order that the cause be discontinued, without prejudice to the right of the plaintiff to commence another action, at such time as it might be advised.

219 On the 11th of April 1903, the Virginia-Carolina Chemical Co. filed a complaint, setting forth the facts mentioned in the first complaint.

On the 30th of May, 1903, the defendant J. P. Kirven served an answer to the complaint, in which he set up the following defences.

"*First*. That S. M. McCall was the owner of the fertilizers, for which said note was given; that at the time the note was assigned to the plaintiff, and at the time of the commencement of said action, S. M. McCall and the defendant J. P. Kirven, were residents and citizens of the State of South Carolina, and therefore, that the Circuit Court of the United States was without jurisdiction.

"*Second*. That the plaintiff was a foreign corporation, and could not maintain the action, for the reason that it had failed to comply with the requirements of the statute, relative to foreign corporations doing business in this State.

"*Third*. That the note sued upon in this action was given by the defendant to S. M. McCall for fertilizers, for which he agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers, in making a crop for the year in which the said note was given, but the said fertilizers were so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being of benefit to the crops of defendant, and his tenants

and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note."

On the 12th of April 1904, his Honor W. H. Brawley, United States Judge, granted leave to the defendant J. P. Kirven to
220 file such additional answer or counter-claim as he might be advised.

On the 6th of March 1905, the defendant J. P. Kirven filed his answer, reciting that he "by leave of the Court first had and obtained files this his supplemental answer hereby withdrawing any former answer hereto filed by him herein."

The amended answer contained the first two defenses hereinbefore mentioned, and as a third defense by way of counterclaim alleged, that under attachment proceedings in North Carolina, the plaintiff had in his possession, the proceeds of 70 bales of cotton amounting to $2,450.00, belonging to the defendant J. P. Kirven, and for which he demanded judgment.

But the third defence hereinbefore mentioned, *was withdrawn by leave of the Court*, and no reference was thereafter made in the pleadings, to the defense of failure of consideration. Consequently during the progress of the trial, when the defendant J. P. Kirven commenced to testify about the crops, His Honor, the United States Judge, promptly ruled *that such testimony was not admissible, and excluded it.*

In that action, the jury rendered a verdict in favor of the plaintiff for $911.07, and on the 4th of April 1905 judgment was duly entered thereon.

On the 11th of October 1906 a certified record of the said judgment was filed in the office of the Clerk of the Court of Common Pleas for Darlington County.

On the 8th of February 1904 (*before judgment was entered in the Circuit Court of the United States*) J. P. Kirven commenced the present action, in the Court of Common Pleas for Darlington County against the Virginia-Carolina Chemical Co. alleging that said defendant caused damage to his crops in the sum of $1,995.00 by reason of selling to him acid phosphate and dissolved bone, which "had been manufactured with such gross negligence and want of skill, that instead of being advantageous to the crops to which they were
221 applied, they destroyed the same in large part, and were not only worthless to the plaintiff, but by destroying his crops, damaged him very heavily."

The answer of the defendant to this complaint was practically a denial.

Subsequently, however, leave was granted for it to file a supplemental answer, whereupon it set up as a defense that the issues in this action were adjudicated, or could have been determined, in the action in the Circuit Court of the United States.

The jury rendered a verdict in favor of the plaintiff for $1,995.00.

In their argument the appellant's attorneys state that the main issue in the case, is whether the judgment rendered in the Circuit

Court of the United States on the note given for the fertilizers, and here alleged to have destroyed plaintiff's crop, did not adjudicate all issues between the same parties in this cause.

As a preliminary question, it will be necessary to determine what force and effect is to be accorded the judgment rendered in the Circuit Court of the United States.

When the Court derives its jurisdiction from the citizenship of the parties, and no question is raised in the case involving a right under the Constitution or laws of the United States, then the judgment of the Court of the United States is only entitled in a State court to the force and effect it would have had if it had been rendered in the State court. But in all other cases, the Court of the United States will determine the question of *res adjudicata*, upon principles settled by the Supreme Court of the United States.

Hancock Nat. Bank *v.* Farnum, 176 U. S. 640.
Deposit Bank *v.* Frankfort, 191 U. S. 499.
Gunter *v.* R. R., 200 U. S. 273.

In the case heard by the Circuit Court of the United States
222 the question was presented under a statute of the United States whether the assignee of the note had the right to maintain the action.

When the judgment was urged as a bar to the action in the State Court, a Federal question was presented, and must be determined in accordance with the decisions of the United States Supreme Court.

The appellant's attorneys in their argument say: "Speaking generally it may be said that the decisions of these courts establish that when the second suit involves the same claim as the first, the judgment in the first case is an absolute bar, not only as to the matters actually litigated but as to every matter that might have been litigated; that if the second suit is upon an entirely different claim, the estoppel only extends to the matter decided," and cites the leading case of Cromwell *v.* County of Sac, 94 U. S. 351, in which Mr. Justice Field, in behalf of the Court, thus states the principle:

"In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel, against the prosecution of a second action upon the same claim between the same parties upon a different claim or cause of action, or demand, and its effect as an estoppel in another action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example: a judgment rendered upon a promissory note, is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment.
223 If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation is as

conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The present action and that in the Circuit Court of the United States, it is true, were between the same parties, but upon a different claim or demand,—one being upon a promissory note, and the other for unliquidated damages arising from the destruction of the plaintiff's crops through the alleged gross negligence on the part of the defendant in the manufacture of the fertilizers used upon said crops.

Therefore plaintiff is not estopped from raising this question unless it was *actually* litigated and determined in that action. The record however shows that the claim upon which this action is based was *withdrawn and not abandoned, and* that when J. P.
224 Kirven offered to introduce testimony as to the crops, his Honor the presiding Judge ruled that it was incompetent.

The first and second exceptions are overruled.

The third exception cannot be sustained for the reason, that when the charge is considered in its entirety, it will be seen that it is not susceptible of the inferences which the appellant has drawn from it.

The fourth exception must be overruled, as the fact that in a number of instances in which the fertilizers were used the crops were destroyed, afforded some evidence tending to show that the fertilizers were worthless and deleterious to the crops.

It is the judgment of this Court that the judgment of the Circuit Court be affirmed.

[Seal Supreme Court of South Carolina.]

A true copy.

U. R. BROOKS,

Clerk Supreme Court of S. C.

225 [Endorsed:] 6616. State of South Carolina. In the Supreme Court. J. P. Kirven, Plaintiff-Respondent, *vs.* Virginia-Carolina Chemical Company, Defendant-Appellant. Opinion by Eugene B. Gary, A. J. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 5 Aug. 1907. U. R. Brooks, Clerk.

226 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1907, Fourth Circuit, Darlington County.

J. P. KIRVEN, Plaintiff-Respondent,
against
VIRGINIA-CAROLINA CHEMICAL COMPANY, Defendant-Appellant.

Concurring Opinion by C. A. Woods, A. J.

The question of *res judicata* is close and difficult, but I think the conclusion reached by Mr. Justice Gary is right on principle and authority.

The Virginia-Carolina Chemical Company, defendant in this action, sued the plaintiff Kirven in the Federal Court on a note aggregating $2228, given for the purchase money of fertilizers. Kirven set up, among other defences, failure of consideration in that the fertilizer was not only worthless but positively deleterious. Subsequently, this defense was withdrawn and on the trial of other issues the defendant recovered judgment for $1723.40.

While the suit on these notes was pending in the Federal Court, Kirven commenced this action against the Virginia-Carolina Chemical Company in the Court of Common Pleas for Darlington County to recover damages to his crop from the use of the fertilizer for which the notes were given; the essence of the complaint being contained in this paragraph: "That the said fertilizers, to wit: acid phosphate and dissolved bone, had been manufactured with such gross negligence and want of skill that, instead of being of advantage to the crops to which they were applied, they destroyed the same in
227 large part, and were not only worthless to the plaintiff, but, by destroying his crops, damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of $1995, and costs.

The Virginia-Carolina Chemical Company answered by a general denial, but after the termination of the suit on the note, by supplemental answer, alleged that the claims set up by Kirven had been adjudicated in the action on the note in the Federal Court, having introduced the record in the Federal Court on this ground the defendant requested the State Court to direct a verdict in its favor.

It is clear that Kirven's claim might have been set up as a counter-claim in the Federal Court; and the appellant first contends the Code of Procedure expressly requires all counter-claims to be set up in the answer. This position is thoroughly unsound.

Section 170, which is relied on, is "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language without repetition."

All that this means is that any paper purporting to be an answer must contain either a denial or material allegation of the complaint or new matter constituting a defence or a counter-claim, or it will be no answer. It can not in any view be considered a legislative enactment that any separate cause of action which might have been, but was not, used as a counter-claim, shall not be available in a separate action.

There are such enactments in the Codes of some states, but they are very different from section 170 of our Code. The Codes of California and Minnesota are examples. Bronson *v.* Kramer, (Cal.) 66 Pac. 979; Lowry *v.* Hurd, 7 Minn. 356. Mr. Pomeroy clearly lays down the rule that provisions for the counter-claim such
228 as are contained in our Code do not preclude the defendant from bringing a separate suit on a cause of action which might have been set up as a counter-claim. Pomeroy's Rem. 804.

Counsel for appellant strongly argued, however, even if this is true as a general rule, "this rule does not apply where the subject matter of the set-off or counter-claim was involved and adjudicated in the former action in such wise that the judgment therein necessarily negatives the facts on which the defendant would have to rely in order to establish his demand."

This statement of an exception to the general rule taken from Cyc. 1202 may be accepted as true, yet I do not think this case falls under it.

Had Kirven gone to trial on the plea of failure of consideration, saying nothing of his counter-claim for damages, and had lost on that issue, the judgment would have been conclusive that there was no failure of consideration, and hence obviously no basis for a separate action for damages for injury done by the fertilizer sold. The case in that condition would have been within the exception.

But he had his election to use the fact, if it be, of the worthlessness of the fertilizer as a defence by pleading failure of consideration; or, by separate suit, assert as a distinct cause of action the fertilizer to be positively deleterious and claim damages for the injury which resulted from its use.

Inasmuch as he did not submit the issue of failure of consideration in the Federal Court, the judgment in that Court did not adjudicate that there was no defect in the goods or injury from their use. It only precluded Kirven from setting up defects as a defence ever thereafter, on the familiar rule that a defendant must set up all his defences or lose the benefit of them. Therefore as a defence, failure of consideration was gone.

229 But when Kirven elected not to use, as a defence, the fact of worthlessness which might have been available in the action of the Virginia-Carolina Chemical Company against him, he was not precluded from using the very different facts of deleteriousness and positive injury caused by appellant's alleged negligence in the manufacture of the fertilizer as the basis of an independent cause of action.

Having such a cause of action against the Virginia-Carolina Chemical Company, Kirven had a right to choose his own time and his

own tribunal for asserting it, and could not be forced to assert it at the time and before the tribunal chosen by the company. This conclusion is, I think, in accord with the principles laid down in Hart *v.* Bates 17 S. C. 40.

The reason for it is thus stated in the lucid opinion of Judge Sanford in Brown *v.* Bank, 132 Fed. 452: "The reason for this rule is that the damages resulting from the plaintiff's wrongful act may be indeterminate, or may not have entirely accrued, when he brings his action, and it might be unjust or inequitable to permit him to determine the time when the defendant must present and prove his claim for the damages which he has suffered from the breach of the plaintiff's contract."

In Cromwell *vs.* Sac County 94 U. S. 351, Justice Field uses this language: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points contravened, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined.

"Only upon such matters is the judgment conclusive in another action." This language is quoted with approval in Wil-
230 loughby *vs.* R. R. Co., 52 S. C. 174, where however the doctrine of *res judicata* was held to apply because the very questions made in the second suit had been actually litigated and decided in the first.

It has been repeatedly held that a judgment for the purchase of goods does not preclude a separate action against the seller for breach of warranty, and the principle has been extended to other like cases, unless the purchaser had set up the breach as a defence or counter-claim. Black on Judgments, secs. 761-769; Van Fleet on Former Adjudication, secs. 168-170; 23 Cyc. 1202; Pomeroy's Rem. sec. 804; 24 Am. & Eng. Enc. 785; Riley *v.* Hale (Mass.) 33 N. E. 491; Dewsnap, *et al.*, *v.* Davidson (R. I.) 26 Atl. 902; Jones *v.* Witousek, *et al.*, (Iowa) 86 N. W. 59; Upfalt *v.* Workman, *et al.* (Neb.) 46 N. W. 419; Kennedy *v.* Davisson (W. Va.) 33 S. E. 291; Van Epps *v.* Harrison (N. Y.) 40 Am. Dec. 326; note Johnson *v.* Reeves (Ga.) 37 S. E. 980 Pub. Ass'n *v.* Fisher (Mich.) 54 N. W. 759; Green *v.* Bank, *supra*.

Cases like Ryan *vs.* Association, 50 S. C. 185, are not apposed to this conclusion. There Ryan sued to recover double the sum alleged to have been received by the defendant association for usurious interest. The charging of usurious interest was under the statute a defence to the action on the debt, but the penalty was recoverable as a counter-claim or in a separate action only for usurious interest actually *received*. Before any action was brought on the debt, usurious interest had been charged but not received. To this action, therefore, Ryan had a defence for usury but no counter-claim for a penalty. He did not set up the defence and therefore it was held, *a* after judg-

ment against him on the debt, the defence of usury was forever shut off, just as the defence of payment would have been.

It was held further that the excess of interest having been received not on the contract but on the judgment into which the agreement had been merged, the penalty could not be recovered. But it was not held nor intimated that if usurious interest be
231 received on a contract *before judgment,* the debtor could not bring a separate action for the penalty, though he had chosen not to set up the defence of usury against the suit on the contract. On the contrary, the opinion was expressed that he could bring such an action without having set up the defence of usury.

It is difficult to understand how the failure of the crops on the land where the fertilizer in question was used could have been caused by negligence in its manufacture, but there was much evidence for the consideration of the jury on that point, and the judgment, therefore, cannot be reversed for an entire lack of testimony to sustain it.

[Seal Supreme Court of South Carolina.]

A true copy.
U. R. BROOKS,
Clerk Supreme Court of S. C.

232 [Endorsed:] 6616. State of South Carolina in the Supreme Court. J. P. Kirven, P'tff-Resp'd't, *v.* Virginia Carolina Chemical Co., D'f'd't-Appel't. Concurring Opinion by C. A. Woods, A. J. Supreme Court of South Carolina. Clerk's office, Columbia, S. C. Filed 5 Aug., 1907. U. R. Brooks, clerk.

233 STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1907, Fourth Circuit, Darlington Co.

J. P. KIRVEN, Plaintiff-Respondent,
against
VIRGINIA-CAROLINA CHEMICAL COMPANY, Defendant-Appellant.

Dissenting opinion by Y. J. POPE, *C. J.:*

Being unable to concur in the opinion of Mr. Justice Gary I state briefly my views. The Code of Civil Procedure of 1902, Section 170, provides: "The answer of the defendant *must* contain:

1. A general or special denial. (2) A statement of any new matter constituting a defense or counter claim, in ordinary and concise language, without repetition." Section 171 provides: "The counter-claim mentioned in the last section must be one existing in favor of the defendant, against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2)

In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

"The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as heretofore have been denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action
234 which they are intended to answer, in such manner that they may be intelligibly distinguished." For a proper understanding of the spirit which prompted these sections it will be necessary to refer briefly to the state of procedure as it existed at the time of the adoption of the code. It will be remembered that prior thereto tribunals for the trial of questions of law were separate and distinct from those which had to deal with equity issues. Likewise there were numerous forms in accordance with which it was necessary to bring the various classes of cases then existing. Consequently all procedure was fraught with much technicality. Choice of a wrong form or failure to distinguish between legal and equitable issues often proved fatal to causes of action. With the progress of the science, however, it was impossible that such a state of affairs could continue. Formality had to give place to materiality. The relief sought was embodied in the Code, which provided for the abolition of all distinction between suits in equity and actions at law and the abolition of all common law forms and the establishment of one form to be known as the civil action. It was intended that the new procedure should be highly remedial. Instead of having to split actions and bring law issues in law courts and equity issues in equity courts, or law defenses in law courts and equity defenses in equity courts, there was to be but one action in which all joined in interest must be made parties and every question connected with the case was adjudicated. Litigation would be thus convenienced and multiplicity of suits prevented. Proceeding to carry out this design the framers of this legislation were met with cases in which although it might be an advantage to litigants to pursue a certain course yet there was no special advantage to be gained as a matter of public policy. Others occurred in which justice and public policy demended certain methods of procedure. In providing for the former permissive words were used while in the latter cases the language is mandatory. Attention is called to this for the purpose of
235 emphasizing the word *must* in the act now under consideration. The legislature having used the term this Court must take for granted that it was used advisedly and for purpose of remedying some existing evil. It has no authority to hold that the term was used inadvertently. The act also provides that the defendant may set up as many defenses or counter-claims as he has however inconsistent they are with each other. This is to give him the benefit of all his claims. Construing this clause with the whole act the strong implication is if he fail to set up any one of his defenses or counter claims he is, after judgment, precluded from again asserting what might have been his right. This is the only construction consistent with the mandatory injunction as to what the answer shall contain. Of course it does not apply to defenses

or claims not included in the statu The law gives the defendant an opportunity but does not attempt to compel him to take advantage of it; that is, it does not attempt to say that he shall set up all of his claims and defenses. Under our statute one action makes a finality. Pomeroy in his work on Remedies, section 804, says in the absence of statutory provision it is not necessary to plead counterclaims in defense. Impliedly, however, where statute does require it, all claims and defenses must be set up. Is the statute above quoted applicable to the case now under consideration? Section 171 provides, among other things, that counter claims mentioned in the preceding section must exist in favor of the defendant against the plaintiff and must arise out of the same transaction or be connected with the subject matter of the suit. This language, while to some extent indefinite, is sufficiently clear to remove all doubt from this case. It seems plain that the claim on which the action here is brought arose out of the transaction as to the fertilizer. But if this be doubted, certainly no one can doubt but that it is connected with the subject matter of the former suit. The fertilizer sold was productive of the alleged damage here sought to be recovered for. Therefore, it should have been set up as a defense.

236 There are no cases exactly in point, but McAlily *v.* Barber, 4 S. C. 48, and Rice *v.* McHaffey, 9 S. C. 682 to some extent support the position taken.

But aside from the statutory provision there is strong ground for holding that the plaintiff here cannot now maintain his action. The general rule will not be doubted that a direct final judgment of a court of competent jurisdiction, on the same subject matter, between the same parties, and privies in law or estate, is conclusive and cannot be reëxamined in a subsequent action in the same or any other court. Manigaut *v.* Deas, Bailey's Eq. 293; McDowell *v.* McDowell, B. Eq. 326; Davis *v.* Murphy, 11 Rich 560; Hart *v.* Bates, 17 S. C. 35. The difficulty however arises in the application of the rule. What constitutes the same subject matter and what are the issues decided? The rule as laid down by Taylor on Evidence, Vol. 2, Sec. 1513 that "except in special cases, the plea *res adjudicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the litigation and which the parties, exercising reasonable diligence might have brought forward at the time," is supported by much authority: 24 A. & E. Ency. of Law, 781; Outram *v.* Morewood, 3 East 346; Gould *v.* Ry., 91 U. S. 533; Henderson *v.* Henderson, 3 Hare 115; Stafford *v.* Clark, 2 Bing. 382; Miller *v.* Covert, 1 Wend. 487; Bagot *v.* Williams, 3 B. & C. 241; Roberts *v.* Heine, 27 Ala. 678; Dunham *v.* Bower, 33 Am. Rep. 576; Cromwell *v.* Sac County, 94 U. S. 351; Dowell *v.* Applegate, 152 U. S. 327 and numerous other United States cases. Equally well founded is the principle that a party cannot split up his defenses. Beloit *v.* Morgan, 7 Wallace 632; Henderson *v.* Henderson, *supra;* Gunter *v.* Ry., 200 U. S. 273. Without passing on these questions, however, we proceed to the principle that seems conclusive of the case. Without conflict are the authorities in

holding that where judgment goes against the defendant
237 and he afterwards sues the plaintiff on a cross claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action or in direct opposition to them the former judgment is a bar. Black on Judgments, Sec. 767; 23 Cyc. 1202; Ryan *v.* Association, 50 S. C. 187; Bigelow on Estoppel (2nd Ed.) p. 36; Richert *v.* Krass, 41 N. E. 835; Blair *v.* Bartlett 31 Am. Rep. 455; Dunham *v.* Bower, *supra*. Welling *v.* Association, 116 Fed. 100; Fayerweather *v.* Ritch, 195 U. S. 301. This rule is founded on grounds of reason and public policy. Without it the conclusiveness of judgments would become a will-o-the-wisp, a mere phantom existing in the imagination of the minds. The second Court obtaining jurisdiction, if it sustains the claim of the plaintiff, would in effect reverse the decision of the former court and make it a mere nullity in many cases. A state of facts found to exist by a jury of twelve men could be declared by twelve others not to exist. Never could a plaintiff who recovers judgment in an action feel assured that the defendant was not keeping back some counter-claim by which he meant to make his judgment of no effect. Courts of justice would be robbed of much of their justice—dispensing power, and great multiplicity of suits would result.

With this principle in view let us examine the facts of the present case. There can be no doubt that although the former action in this case was brought upon a note, it was in fact for the recovery of the value of the fertilizer here alleged to have caused the damage. Plaintiff himself in the record admits this. What issue was decided then in that former case? Plaintiff there alleged that it had sold to the defendant fertilizer to the value of a certain sum. This defendant denied. The issue went to the jury and they found for the plaintiff. Interpreting their verdict, they in effect say that plaintiff did sell the defendant fertilizers, that they were valuable to him to the
238 amount claimed, and therefore, defendant should pay plaintiff such amount. The defendant now brings this action alleging damages arising from the deleterious quality of fertilizers. This would have been a perfect defense to the action above referred to if defendant could have proved it. He could even have claimed his damage and the jury instead of finding that the fertilizers were of value to him could have found that they did him damage and could have given him a judgment against the plaintiff. This case is identical in principle with the case of Blair *v.* Bartlett, *supra*. In that case plaintiff brought an action for malpractice. Prior to this action defendant had brought an action against him in which he recovered the full amount claimed for his services. To this action he pleaded *res adjudicata*. The Court sustained this plea, saying that the former case had established the facts of the rendition of the services and that they were valuable to the defendant since he was compelled to pay for them. But if of value, they could not have been useless, and if of no use, they could not have been harmful. Identical are the facts found here. The former action settled beyond all question that plain-

tiff received the fertilizers and that they were of value to him. Applying the reasoning of the court above, if they were of value they could not have been useless, and if of use they could not have been harmful. Value and harm are antipodal terms. They can not coexist in the same material. The former action having found that the fertilizers were valuable if the plaintiff is now allowed to recover in this action he must necessarily impute error to the former finding of a court of competent jurisdiction, a thing which according to the authorities and as a matter of public policy he will not be allowed to do.

For these reasons I think the judgment should be reversed.

[Seal Supreme Court of South Carolina.]

A true copy.
U. R. BROOKS,
Clerk Supreme Court of S. C.

239 [Endorsed:] 6616. State of South Carolina. In the Supreme Court. April Term 1907. Fourth Circuit Darlington Co. J. P. Kirven P'ff-Resp'd't *v.* Virginia Carolina Chemical Co. D'ft-Appel't. Dissenting opinion by Y. J. Pope C. J. I concur in the view that there should be a reversal upon the ground last discussed in this opinion. Ira B. Jones A. J. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 5 Aug. 1907. U. R. Brooks, Clerk.

240 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. P. Kirven, plaintiff, and Virginia-Carolina Chemical Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendant, Virginia-Carolina Chemical Company, as by

its complainant appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
241 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and seven.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed to operate as a supersedeas:

Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

Service accepted Sept. 9th, 1907.

E. O. WOODS,
Of Counsel for Pl'ff.

242 [Endorsed:] United States of America, in the Supreme Court. Virginia-Carolina Chemical Company, Plaintiff in Error, against J. P. Kirven, Defendant in Error. Writ of Error. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 10 Sep. 1907. U. R. Brooks, Clerk.

243 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To J. P. Kirven, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of South Carolina wherein Virginia-Carolina Chemical Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Y. J. Pope, Chief Justice of the Supreme Court of the State of South Carolina, this 31st day of August, in the year of our Lord one thousand nine hundred and seven.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

Service accepted Sept. 4th, 1907.

E. O. WOODS,
Of Counsel for Plaintiff.

244 [Endorsed:] United States of America, in the Supreme Court. Virginia-Carolina Chemical Company, Plaintiff in Error, against J. P. Kirven, Defendant in Error. Citation. Supreme Court of South Carolina. Clerk's Office, Columbia, S. C. Filed 7 Sep. 1907. U. R. Brooks, Clerk.

245 *Copy Bond.*

Know all men by these presents, That we, Virginia-Carolina Chemical Company, as principal, and American Bonding Company of Baltimore as sureties, are held and firmly bound unto J. P. Kirven in the full and just sum of Three Thousand ($3,000.00) Dollars to be paid to the said J. P. Kirven, his certain attorneys, executors, administrators, heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of September in the year of our Lord One Thousand Nine Hundred and Seven.

Whereas, lately at a term of the Supreme Court of the State of South Carolina in a suit depending in said Court, between J. P. Kirven and Virginia-Carolina Chemical Company, a judgment was rendered against the said Virginia-Carolina Chemical Company, and the said Virginia-Carolina Chemical Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. P. Kirven citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, That
246 if the said Virginia-Carolina Chemical Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] VIRGINIA-CAROLINA CHEMICAL CO.,
By E. B. ADDISON, *2d Vice-Pres.*

Attest:
S. D. CRENSHAW, *Sec'y.*

[SEAL.] AMERICAN BONDING COMPANY OF BALTIMORE.
By B. A. HAGOOD, *Attorney in Fact.*

Approved:
Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

A true copy.
U. R. BROOKS,
Clerk Supreme Court of S. C.

247 [Endorsed:] Copy Bond. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 10 Sep. 1907. U. R. Brooks, Clerk.

248 In the Supreme Court of the United States, October Term, 1907.

VIRGINIA-CAROLINA CHEMICAL COMPANY, Plaintiff in Error,
against
J. P. KIRVEN, Defendant in Error.

Assignments of Error.

Now comes the Virginia-Carolina Chemical Company, Plaintiff in Error, and respectfully represents that it feels aggrieved by the proceedings and judgment of the Supreme Court of the State of South Carolina in the above entitled cause, and in connection with its petition for writ of error herein makes the following assignments of error, to-wit:

I.

That the said Supreme Court of South Carolina in its final decree erred in deciding against a title or right set up and claimed under an authority exercised under the United States, in that by failing to sustain the plea of *res judicata* interposed by plaintiff in error, defendant in the court below, it failed and refused to give proper and full credit to the judgment of the United States rendered in the case in the Circuit Court of the United States, and thereby denied to the plaintiff in error, defendant in the court below, a right arising under the authority of the United States.

Wherefore the said Virginia-Carolina Chemical Company, Plaintiff in Error, prays that the said judgment and decree of *of* the said Supreme Court of South Carolina be reversed, and that the
249 said Supreme Court of the United States cause further to be done herein what of right and according to the laws and customs of the United States should be done.

WILLCOX & WILLCOX,
MITCHELL & SMITH,
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Attorneys for Plaintiff in Error.

250 [Endorsed:] In the Supreme Court of the United States, October Term, 1907. Virginia-Carolina Chemical Company, Plaintiff in Error, against J. P. Kirven, Defendant in Error. Assignments of Error. Original. Supreme Court of South Carolina, Clerk's Office, Columbia, S. C. Filed 10 Sep. 1907. U. R. Brooks, Clerk.

251 STATE OF SOUTH CAROLINA:

In the Supreme Court.

J. P. KIRVEN, Plaintiff-Respondent,
vs.
VIRGINIA-CAROLINA CHEMICAL CO., Defendant-Appellant.

Return to Writ of Error.

I, U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina, by way of return to the Writ of Error directed to said Court by the Supreme Court of the United States in the above entitled cause, herewith transmit under my hand and seal a copy of the record, and of the assignment of errors and of all proceedings in the case, together with true copies of all opinions filed in the case, and I hereby certify that the record herewith transmitted is complete, containing in itself and not by reference all the papers, exhibits, depositions and other proceedings necessary to the hearing of said case in the Supreme Court of the United States.

Witness my hand and the seal of the Supreme Court of the State of South Carolina this 14th day of September, 1907.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

252 [Endorsed:] State of South Carolina In the Supreme Court Virginia-Carolina Chemical Company Plaintiff in Error against J. P. Kirven Defendant in Error. Certificate of Clerk Supreme Court of S. C.

Endorsed on cover: File No. 20,880. South Carolina supreme court. Term No. 189. Virginia-Carolina Chemical Company, plaintiff in error, *vs.* J. P. Kirven. Filed October 9th, 1907. File No. 20,880.

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Supreme Court of the United States

OCTOBER TERM, 1908

No. [redacted] 18.

VIRGINIA-CAROLINA CHEMICAL COMPANY,
PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF VIRGINIA-CAROLINA CHEMICAL COMPANY.

P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Virginia-Carolina Chemical Company.

The State Co., Law Printers, Columbia, S. C.

Supreme Court of the United States

OCTOBER TERM, 1908

No. 189

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PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF VIRGINIA-CAROLINA CHEMICAL COMPANY.

P. A. WILLCOX,
F. L. WILLCOX,
HENRY E. DAVIS,
Attorneys for Virginia-Carolina Chemical Company.

STATEMENT OF CASE

On the 8th day of February, 1904, J. P. Kirven, as plaintiff (now defendant in error), commenced this action in the Court of Common Pleas for Darlington County, South Carolina, against Virginia- Carolina Chemical Com-

pany, as defendant (now plaintiff in error), to recover of that company damages in the sum of nineteen hundred and ninety-five ($1,995) dollars alleged to have been sustained by him on account of injury to his crops of corn and cotton caused by the use of certain fertilizers furnished him by it. The complaint alleged that the fertilizers in question were purchased through one S. M. McCall on February 17, 1898, and that the Chemical Company, when it undertook to fill the order, knew they were to be used in making crops of corn and cotton and assumed to furnish fertilizers suitable for these purposes; but, instead of so doing, the fertilizers furnished, "to wit: acid phosphate and dissolved bone had been manufactured with such gross negligence and want of skill that, instead of being of advantage to the crops to which they were applied, they destroyed the same in large part, and were not only worthless to the plaintiff, but, by destroying his crops, damaged him very heavily." (Transcript of Record, pp. 1, 2.)

It will thus be seen that two charges were made against the Chemical Company as a result of its alleged gross negligence and want of skill in the manufacture of the fertilizers in question, namely: (1) that the fertilizers were worthless to Kirven, the purchaser, and (2) were so positively vicious as to destroy his crops.

In due time, the Chemical Company filed its answer wherein it denied all the issuable allegations of the complaint. (Transcript of Record, p. 2.)

For a proper understanding of the question before the Court on this writ of error a statement of certain transactions following the sale of the fertilizers is at this point essential.

In the early part of the year 1898 the Chemical Company, through its agent, S. M. McCall, sold to Kirven certain fertilizers aggregating in value two thousand two hundred and ninety-eight ($2,298) dollars, taking as security therefor Kirven's note for the amount due. (Transcript of Record, pp. 100, 101 *et seq.*)

The note not having been paid, thereafter the Chemical Company by a summons served April 17, 1903, (Transcript of Record, p. 90,) commenced an action in the Circuit Court of the United States for the District of South Carolina against Kirven on the promissory note given by him as evidence of his indebtedness for the fertilizers. At the same time this suit was commenced in the Circuit Court of the United States nothing whatever had been paid on the note, hence the claim was for more than the requisite jurisdictional amount, as the principal of the note was two thousand two hundred and ninety-eight ($2,298) dollars, with interest thereon from October 25, 1898 (Transcript of Record, p. 89). On the 30th day of May, 1903, Kirven served his answer setting up several defenses, among them one to the effect that he had paid a sound price for the fertilizers for which the note was given, but that the said fertilizers were so unskilfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being of benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note." (Transcript of Record, pp. 167-8.)

Prior to the bringing of this suit on the note in the Circuit Court of the United States, the Chemical Company had commenced a proceeding in the courts of North Carolina, in the course of which it had caused to be attached in the hands of Alex. Sprunt & Sons, at Wilmington, N. C., the proceeds of certain cotton belonging to Kirven (Transcript of Record, p. 159). This attachment suit proceeded in the jurisdiction of the Superior and Supreme Courts of North Carolina at Wilmington, and resulted finally in a judgment in favor of the Chemical Company for the sum of seventeen hundred twenty-three and 40-100 ($1,723.40) dollars as the proceeds of seventy bales of cotton in the hands of Sprunt & Son belonging to Kirven. The judgment of the North Carolina Superior Court was rendered

April 6, 1903 (Transcript of Record, p. 163), but an appeal was taken to the Supreme Court of the State, and was still pending when Kirven filed his answer to the suit on the note in the United States Circuit Court. (Affidavit of Geo. W. Brown, Transcript of Record, p. 153).

Sometime subsequent to the bringing of the suit on the note in the United States Circuit Court, the appeal to the North Carolina Supreme Court from the judgment in the attachment suit in Wilmington was abandoned; whereupon the attorneys for Kirven moved the Circuit Court of the United States, due notice thereof having been given, for an order allowing them to serve an amended or supplemental answer setting forth the fact that subsequent to the bringing of the action a final judgment had been rendered in the attachment suit in North Carolina decreeing that the Chemical Company was entitled to the proceeds of seventy bales of the attached cotton, and that this should be applied as a credit on the note. This was the only particular in which leave for amendment was asked (Transcript of Record, pp. 152-3). The leave prayed for was granted by his Honor Judge Brawley by an order dated April 12, 1904 (Transcript of Record, p. 154).

Instead, however, of confining themselves to the matters asked for in their motion to amend, Kirven's attorneys, in addition, left out of their supplemental answer all reference to any charge of damage to crops from the harmful action of the fertilizers as alleged in their original answer. (Supp. Answer, Transcript of Record, pp. 91-93, Orig. Ans., Transcript of Record, pp. 167-8).

On March 16, 1905 (Transcript of Record, p. 93,) the cause in the United States Circuit Court duly came on for trial, testimony was taken, in the course of which a certified copy of the portion of the record in the attachment suit in North Carolina appearing at pages 154 to 164 of the Transcript of Record was duly admitted (Transcript of Record, p. 116,) and the jury, after allowing all proper credits, found for the Chemical Company, plaintiff therein, in the sum of nine hundred eleven and 7-100 ($911.07) dol-

lars, the balance due on the note (Transcript of Record, p. 94). Judgment was duly entered on this verdict (Transcript of Record, p. 96), a writ of error was sued out by Kirven to the Circuit Court of Appeals for the Fourth Circuit (Transcript of Record, p. 147), and the judgment of the Circuit Court was duly affirmed by that court (Mandate, Transcript of Record, p. 165).

This brings us back to the case at bar—the one commenced by Kirven to recover damages for injury to his crops by the same fertilizers the indebtedness for which was evidenced by the note sued and recovered on by the Chemical Company in the United States Circuit Court.

After the rendition of the judgment by the United States Circuit Court, the attorneys for the Chemical Company sought and obtained leave to file a supplemental answer wherein they set up the fact of the rendition of such judgment and alleged that the parties to that cause and those in the case at bar were identical, that precisely the same issues were raised or were necessarily involved, the judgment in that cause having been rendered in a suit on a promissory note given by Kirven for the fertilizers from the alleged bad quality of which the present action arose, and, further, that the judgment of the United States Circuit Court was a conclusive adjudication of all issues sought to be litigated in the present action. (Transcript of Record, pp. 3-4.)

On the trial of the cause in the Court of Common Pleas for Darlington County, the Chemical Company introduced in evidence a certified transcript of record from the United States Circuit Court for the District of South Carolina of the case of J. P. Kirven, Plaintiff in error *vs.* Virginia-Carolina Chemical Company (Transcript of Record, p. 75). (This transcript appears as Exhibit "A," pages 89-168 of the Transcript of Record.) Having introduced the record from the United States Court, counsel for the Chemical Company, at the conclusion of the entire case, moved that a verdict be directed in its favor on the ground of *res judicata*, the motion being made generally and without any

reference to Art. IV, Sec. 1, of the Constitution. (Transcript of Record, pp. 80, 84.) This motion was refused, and the jury returned a verdict for Kirven in the sum of nineteen hundred and ninety-five ($1,995) dollars, the full amount sued for. (Transcript of Record, p. 84.) A motion for new trial was made on the ground, among others, of error in failing to sustain the plea of *res judicata*. This was also overruled (Transcript of Record, p. 84).

Judgment having been duly entered on the verdict, the Chemical Company appealed to the Supreme Court of South Carolina, assigning as error, among other things, the action of the presiding judge in failing and refusing to sustain the plea of *res judicata*, contending that he thereby decided "against a title or right set up and claimed under an authority exercised under the United States in that he failed and refused to give proper and full credit to the judgment of the United States, rendered in the case in the Circuit Court, and thereby denied to the defendant a right arising under the authority of the United States." (Exceptions 1 and 2, Transcript of Record, pp. 84-85.)

The result of this appeal to the Supreme Court of South Carolina was an affirmance of the judgment below by a divided court, two of the Justices, Messrs. Gary and Woods, holding that the judgment of the United States Circuit Court was not a bar or an estoppel to the maintenance of the present action (Opinion, pp. 169-172; Opinion, pp. 173-176, of Transcript of Record), and the other two members of the Court, Mr. Chief Justice Pope and Mr. Justice Jones, holding that this judgment was a conclusive adjudication of the issue here litigated and it was error to refuse to sustain the plea of *res judicata*. (Opinion of Chief Justice, concurred in by Mr. Justice Jones, pp. 176-180 of Transcript of Record).

From this judgment of the Supreme Court of South Carolina affirming the judgment of the Court of Common Pleas for Darlington County the Chemical Company in due time sued out its writ of error to this Court.

ASSIGNMENT OF ERROR

I.

That the said Supreme Court of South Carolina, in its final decree, erred in deciding against a title or right set up and claimed under an authority exercised under the United States, in that by failing to sustain the plea of *res judicata* interposed by plaintiff in error, defendant in the court below, it failed and refused to give proper and full credit to the judgment of the United States rendered in the case in the Circuit Court of the United States, and thereby denied to the plaintiff in error, defendant in the court below, a right arising under the authority of the United States.

ARGUMENT

Was the Question Litigated in the Present Suit Rendered Res Judicata by the Judgment in the Cause in the Federal Court?

Examination of the record will show that the parties to the suit in the Circuit Court of the United States and the parties to this suit are identical. Not only is this true, but it further appears that the same issues were raised or could have been raised under the scope of the pleadings in that cause, the suit being brought to recover the amount due on a note given for the purchase of these same fertilizers. The record of the Circuit Court of the United States in addition shows that the very claim here sued on was actually interposed by Kirven as a counter-claim in that suit, and afterwards withdrawn under an order allowing him to amend his answer so as to set up a credit by reason of a judgment the Chemical Company had recovered against him. Having elected to withdraw it as a counter-claim in that suit, Kirven now seeks to make it the basis of an action against the Chemical Company, claiming that

he is neither barred nor estopped by the judgment of the United States Court from so doing. That he is both estopped and barred we contend is conclusively demonstrated by the decisions of the Courts of this country, and especially by those of the Courts of the United States, which are controlling in this case. A fact that must be ever borne in mind in considering this question is that *the gravamen of the cause of action in this suit is the affirmative viciousness of the fertilizers sold, which of necessity presupposes a FAILURE OF CONSIDERATION. In other words, so great was the FAILURE OF CONSIDERATION that it passed the bounds of negative worthlessness and assumed the character of POSITIVE VICIOUSNESS.* Keeping this fact ever in view, we shall endeavor to show that the questions here sought to be litigated are *res judicata.*

1. In the first place, the matter here litigated was such a counter-claim as should have been set up in the answer to the suit in the Federal Court.

Section 914 of the Revised Statutes of the United States (4 Fed. Stat. Ann., 563) is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than in equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

See also Simonton's Federal Courts, Secs. 152-157.

In accordance with this provision, the pleadings in an action at law in the Circuit Court of the United States sitting in South Carolina would be precisely as prescribed by the Code of Procedure in a similar action in the State Courts. This being true, what are the requirements of that Code with reference to an answer?

Section 170 of the Code of Procedure provides as follows:

"The answer of the defendant must contain:
"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
"2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition."

Section 171 expressly declares how a counter-claim may arise:

"The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:
"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.
"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The question then arises, was the present cause of action a proper counter-claim in the suit brought in the Circuit Court of the United States? Clearly it was connected with the subject of that action, if it did not arise directly out of the contract there sued on, and hence must be held to have been a proper counter-claim. While this reasoning would seem conclusive, we find direct support for the proposition in *Haygood vs. Boney*, 43 S. C., 63. In that case the plaintiff brought suit to recover a balance due him as a farm laborer, to which defendant interposed a counter-claim for damages alleged to have been sustained by reason of the killing of his horse through the careless and cruel conduct of the plaintiff. The Court held the counter-claim to be perfectly proper. The cases being practically identical in

this respect, we deem further citation of authority on the point to be unnecessary.

Since it would have been a proper counter-claim under the provisions of the South Carolina Code of Procedure, it would also have been a proper counter-claim in the United States Court.

Nor could this result be changed by the fact that it was for less than the judisdictional amount required for the bringing of an action in that Court. If the complaint set out facts showing a valid claim to the extent of the jurisdictional amount, that fact would determine the jurisdiction of the United States Court, regardless of any defense set up in the answer. This was directly ruled in *Schunk vs. Moline*, 147 U. S., 500 (37 L. Ed., 258) where the Court uses this language:

"The fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or if presented, sustained by the Court?"

To the same effect are:

Simonton's Fed. Courts, Sec. 106.

Pickham vs. Manufacturing Co., 77 Fed., 663 (C. C. A.).

Turner vs. Building and Loan Association, 101 Fed., 308 (C. C. A.).

While the counter-claim could not oust the United States Court of jurisdiction once attached, yet it could be interposed whether it exceeded the jurisdictional amount or not. In *Partridge vs. Insurance Co.*, 15 Wall, 573 (21 L. Ed., 230), Mr. Justice Miller thus states the rule:

"It is settled by the case of *West vs. Aurora City*, 6 Wall, 139 (18 L. Ed., 819), that defendants in the Circuit Courts of the United States can avail themselves of the laws which

prevail in the State concerning the right of set-off generally. It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these Courts a suit against a citizen of the State where the Court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing *just and legal set-offs and counter-claims to be interposed and tried in the same suit and same form.*" (Italics added.)

It is true there may be, and are, counter-claims that do not possess any characteristics of a defense; and as to these the general rule is that they may be the subject of a second action. But *such is not the case when the counter-claim must rest on a state of facts that constituted a proper defense to the first action,* the reason being that *there would be a possibility of conflicting findings as to the same facts in the two cases.* Failure to observe this distinction is responsible for the error into which the Supreme Court of South Carolina has fallen in holding that the issue here litigated was not forever set at rest by the judgment of the Circuit Court of the United States.

In 1 Van Fleet on Former Adjudication, Section 171, we find the following:

"If A sues B and the latter has a demand upon which he can maintain an action against the former, the law permits him, within prescribed limits, to plead it by way of a counter-claim, cross-demand or set-off. This pleading is not a defense. It neither denies nor confesses and avoids the plaintiff's cause of action. It is simply a cause of action in favor of the defendant, and the Court deducts the less from the greater and renders judgment for the remainder. But as the plaintiff has an option in respect to the time and place of suing upon his cause of action, and as the defendant possesses the same option, he is not obliged thus to use his cause. Hence, all the cases agree that if he exercises his option, and does not use it as a counter-claim, cross-demand nor set-off, he can maintain an independent action upon it."

To the same effect are Sections 168 and 172.

As a general proposition of law, this statement is undoubtedly correct; but it is subject to a very important qualification that we regard absolutely controlling here. Call it what he may please, *the basis of Kirven's claim in this suit is an alleged FAILURE OF CONSIDERATION of such great degree that it amounted to positive viciousness,* which would have been a perfect defense to the suit in the United States Court. The modification of the general rule referred to above is to the effect that if the second suit must rest upon a state of facts totally inconsistent with those determined by the first judgment, it cannot be maintained. In other words, if the counter-claim grew out of a defense to the first action, and such defense was adjudicated not to exist, the counter-claim cannot be made the subject of a second action, as that would allow a matter once set at rest to be relitigated in a new form and under a new theory. The distinction between the two cases is clearly drawn by the authorities. Thus in 23 Cyc., 1202, it is said:

"As a general rule, where a defendant has an independent claim against plaintiff, such as might be either the basis of a second action or might be pleaded as a set-off or counter-claim, he is not obliged to plead it in plaintiff's action, although he is at liberty to do so; and if he omits to set it up in that action, this will not preclude him from afterward suing plaintiff upon it. But *this rule does not apply where the subject-matter of the set-off or counter-claim was involved and adjudicated in the former action in such wise that the judgment therein NECESSARILY NEGATIVES the facts on which defendant would have to rely in order to establish his demand.*" (Italics added.)

In Section 767 of Black on Judgments, we find the following clear statement of the law:

"Where judgment goes against the defendant, and *he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, IF THE FACTS which he must establish to authorize his recovery*

ARE INCONSISTENT WITH THE FACTS ON WHICH THE PLAINTIFF RECOVERED IN THE FIRST ACTION, or IN DIRECT OPPOSITION TO THEM, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judgment affirms to be true. But if, out of the same transaction or state of facts, each party may acquire a right of action—so that the facts on which the plaintiff recovered may very well be true and yet the facts on which the defendant seeks to recover may be equally true—then the former judgment is not a bar to the maintenance of the present suit." (Italics added.)

Under these authorities we think it clear that Kirven was bound to set up the claim here litigated as a counter-claim in the action brought against him by the Chemical Company in the Circuit Court of the United States, and that his failure to do so has forever estopped him from making the claim.

2. But as Kirven had an opportunity to litigate this issue in the suit in the Federal Court and failed to do so, the judgment rendered by that court shut off every defense he might have. The present suit is based on the failure of consideration, a proper defense to that action; hence this suit is barred whether he made the question there or not.

It is well-settled that where the same issues are being litigated between the same parties at the same time in two courts of concurrent jurisdiction, the first final judgment will render the issues *res judicata* in the other court.

Boatmen's Bank vs. Fritzlew, 135 Fed. (C. C. A.), 650.

24 A. & E. Ency. Law (2d Ed.) 833.

17 Ency. P. &. P., 265, and notes.

Such being the rule, the judgment rendered by the United States Court is a bar and an estoppel if the other conditions are fully met.

In determining the question of *res judicata* raised by the assignment of error, this Court will be governed by its own decisions and not by those of the Supreme Court of South Carolina. Thus it is said by Mr. Justice White in *Gunter vs. A. C. L. R. R. Co.*, 200 U. S. 273 (50 L. Ed., 486):

"Although it be conceded for the sake of argument that the doctrine of *res judicata*, as announced in rulings of the Supreme Court of South Carolina, lend support to the contention made, our duty is to give to the decree of the Circuit Court of the United States in the Pegues case the force and effect to which it is entitled under the principles of *res judicata* as settled by this Court, especially in view of the fact that the controversy in the Pegues case involved rights protected by the Constitution of the United States. *Deposit Bank vs. Frankfort*, 191 U. S., 499, 48 L. Ed. 276."

The reason for such a rule is this: When a party recovers judgment in a court of the United States he becomes entitled to a right arising under the Constitution and laws of the United States, and this right cannot be taken away by State decisions (U. S. Rev. Stat., Sec. 709; 4 Fed. Stat. Ann., 467).

Thus in *Crescent City Live Stock, etc., Co. vs. Butcher's Union, etc., Co.*, 120 U. S., 141 (30 L. Ed., 617), it is said:

"It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the Courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the State Court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a State Court has given due effect to the

judgment of a Court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal Courts by proper process."

Again in *Deposit Bank vs. Frankfort*, 191 U. S., 499, 515 (48 L. Ed., 282), it is said:

"Whether a Federal judgment has been given due force and effect in the State Court is a Federal question reviewable by this Court, which will determine for itself whether such judgment has been given due weight or otherwise."

And on page 517 (L. Ed., 283):

"But it is equally well settled that a right claimed under the Federal Constitution, finally adjudicated in the Federal Courts, can never be taken away or impaired by State decisions. The same reasoning which permits to the States the right of final adjudication upon purely State questions requires no less respect for the final decisions of the Federal Courts of questions of national authority and jurisdiction."

Similar rulings were made in:

Pittsburg, C. C. & St. L. R. Co. vs. Long Island Loan and Trust Co., 172 U. S., 493 (43 L. Ed., 528).

Dowell vs. Applegate, 152 U. S., 327 (38 L. Ed., 463).

Werlein vs. New Orleans, 177 U. S., 390 (44 L. Ed., 820).

National Foundry & Pipe Works vs. Oconto City Water Supply Co., 183 U. S., 216 (46 L. Ed., 157).

Under these authorities, therefore, it is quite clear that whether full faith and credit has been given to a judgment of a court of the United States is *per se* a Federal question; and the answer to such question is to be found in the principles of *res judicata* as applied by the Federal Courts.

The general principles governing the application of the doctrine of *res judicata* are thus stated by Mr. Justice Field in *Cromwell vs. Sac County*, 94 U. S., 351 (24 L. Ed., 197):

"The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example: *a judgment rendered upon a promissory note is conclusive as to* the validity of the instrument and *the amount due upon it, although it be subsequently alleged that PERFECT DEFENSES ACTUALLY EXISTED, of which no proof was offered, such as* forgery, *WANT OF CONSIDERATION*, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. *The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.*

"But *where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (Italics added.)

The following cases are to the same practical effect:

Davis vs. Brown, 94 U. S., 423 (24 L. Ed., 204).
Russell vs. Place, 94 U. S., 606 (24 L. Ed., 214).
Parrish vs. Ferris, 2 Black, 606 (17 L. Ed., 317).
Randall vs. Howard, 2 Black, 585 (17 L. Ed., 269).
Smith vs. Kernochen, 7 Howard, 198 (12 L. Ed., 666).
Thompson vs. Roberts, 24 How., 233 (16 L. Ed., 648).
City of Aurora vs. West, 7 Wall, 82 (19 L. Ed. 42).
Bryan vs. Kennett, 113 U. S., 179 (28 L. Ed., 908).
Dimock vs. Revere Copper Co., 117 U. S., 559 (29 L. Ed., 994).
Milne vs. Dean, 121 U. S., 525 (30 L. Ed., 980).
The Johnson Co. vs. Wharton, 152 U. S., 252 (38 L. Ed., 429).
Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S., 683 (39 L. Ed., 859).
Keokuk & W. R. Co. vs. Missouri, 152 U. S., 301 (38 L. Ed., 450).
Hubbell vs. U. S., 171 U. S., 203 (43 L. Ed., 136).
Hopkins vs. Lee, 6 Wheat., 109 (5 L. Ed., 218).
Bank vs. Beverly, 1 Howard, 134 (11 L. Ed., 75).
Lyon vs. Perin & Gaff Mfg. Co., 125 U. S., 698 (31 L. Ed., 839).

Campbell vs. Rankin, 98 U. S., 261 (25 L. Ed., 435).
Forsyth vs. Hammond, 166 U. S., 506 (41 L. Ed., 1095).
Stout vs. Lye, 103 U. S., 66 (26 L. Ed., 428).

Mr. Justice Gary, writing the leading opinion of the Supreme Court of South Carolina in this case, quotes this general statement of the rule from *Cromwell vs. Sac County,* and then adds:

"The present action and that in the Circuit Court of the United States, it is true, were between the same parties, but upon a different claim or demand,—one being upon a promissory note, and the other for unliquidated damages arising from the destruction of the plaintiff's crops through the alleged gross negligence on the part of the defendant in the manufacture of the fertilizers used upon said crops. Therefore plaintiff is not estopped from raising this question unless it was *actually* litigated and determined in that action." (Transcript of Record, pp. 171-172.)

Mr. Justice Woods writes an opinion concurring in this view (Transcript of Record, pp. 173 *et seq.*).

In our view, however, while citing *Cromwell vs. Sac County* in support of their position, these learned judges failed to recognize the full import of that decision, as well as other decisions of this Court.

By reference to paragraphs 6 and 7 of the original answer to the suit on the note in the United States Circuit Court (Transcript of Record, pp. 166-168), it will be seen that Kirven alleged that the "fertilizers were worthless, and there was a total failure of consideration," and that "the said fertilizers were so unskilfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being of benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note."

On pages 152-3 of the Record, it further appears that Kirven moved to amend his answer by setting up a credit by reason of a recovery against him in the Courts of North Carolina in a suit involving the attachment of the proceeds of certain cotton. On page 154 it appears that the motion was granted by Judge Brawley; but instead of amending the answer solely in the particular prayed, *Kirven elected to strike out all reference to damage to crops and failure of consideration, and set up, by way of counter-claim, a demand for the proceeds of seventy bales of cotton alleged to have been converted by the Chemical Company* (Transcript of Record, pp. 91-93). Such being the facts, under the first rule laid down in *Cromwell vs. Sac County, supra,* to the effect that as a bar a judgment is conclusive as to every defense that *might* have been made to that cause of action, the judgment rendered in the Circuit Court of the United States for the District of South Carolina *forever determined that there was NO FAILURE OF CONSIDERATION by reason of any defects in the fertilizers.* In short, *that judgment determined for all time that the fertilizers sued on were good and could not injure crops.* But if this be true, it must be likewise true that that judgment operates as an estoppel under the second rule laid down in *Cromwell vs. Sac County, supra,* to the effect that a point once decided as between the parties and their privies can never be relitigated either in the same or any other action. *The point absolutely settled by that judgment was that the fertilizers were worth the price, which estops Kirven from ever claiming that they were worthless, whether such claim be a statement of their negative value or an assertion of their positive viciousness. Failure of consideration can not be relitigated in this case,* not even in the guise of an action for tort, as that fact has been already solemnly adjudicated not to exist. There can be no recovery in this case *consistent* with the judgment of the United States Circuit Court, and this is the point these two justices have failed to grasp in upholding the ruling of the State Circuit Judge.

On the other hand, Mr. Chief Justice Pope, in a very able dissenting opinion concurred in by Mr. Justice Jones (Transcript of Record, pp. 176-180), shows that full faith and credit cannot be given the Federal decision if Kirven is allowed to recover in this case, as a recovery here means that the Chemical Company was not entitled to its judgment in the Federal Court. Says the Chief Justice:

"We proceed to the principle that seems conclusive of the case. Without conflict are the authorities in holding that where judgment goes against the defendant and he afterwards sues the plaintiff on a cross claim which he might have presented in the first suit, but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action or in direct opposition to them the former judgment is a bar. Black on Judgments, Sec. 767; 23 Cyc., 1202; *Ryan vs. Association*, 50 S. C., 187; Bigelow on Estoppel (2d Ed.) p. 36; *Rickert vs. Krass*, 41 N. E., 835 (Ind.); *Blair vs. Bartlett*, 31 Am. Rep., 455; *Dunham vs. Bower*, 33 Am. Rep. 576; *Welling vs. Association*, 116 Fed., 100; *Fayerweather vs. Ritch*, 195 U. S., 301. This rule is founded on grounds of reason and public policy. Without it the conclusiveness of judgments would become a will-o'-the-wisp, a mere phantom existing in the imagination of the mind. The second Court obtaining jurisdiction, if it sustains the claim of the plaintiff, would in effect reverse the decision of the former court and make it a mere nullity in many cases. A state of facts found to exist by a jury of twelve men could be declared by twelve others not to exist. Never could a plaintiff who recovers judgment in an action feel assured that the defendant was not keeping back some counter-claim by which he meant to make his judgment of no effect. Courts of justice would be robbed of much of their justice-dispensing power, and great multiplicity of suits would result.

"With this principle in view let us examine the facts of the present case. There can be no doubt that although the former action in this case was brought upon a note, it was in fact for the recovery of the value of the fertilizer here alleged to have caused the damage. Plaintiff himself in the record admits this. What issue was decided then in that former case? Plaintiff there alleged that it had sold

to the defendant fertilizer to the value of a certain sum. This defendant denied. The issue went to the jury and they found for the plaintiff. Interpreting their verdict, they in effect say that plaintiff did sell the defendant fertilizers, that they were valuable to him to the amount claimed, and therefore defendant should pay plaintiff such amount. The defendant now brings this action alleging damages arising from the deleterious quality of fertilizers. This would have been a perfect defense to the action above referred to if defendant could have proved it. He could even have claimed his damage, and the jury, instead of finding that the fertilizers were of value to him, could have found that they did him damage and could have given him a judgment against the plaintiff. This case is identical in principle with the case of *Blair vs. Bartlett, supra.* In that case plaintiff brought an action for malpractice. Prior to this action defendant had brought an action against him in which he recovered the full amount claimed for his services. To this action he pleaded *res judicata.* The Court sustained this plea, saying that the former case had established the facts of the rendition of the services and that they were valuable to the defendant, since he was compelled to pay for them. But if of value, they could not have been useless, and if of use, they could not have been harmful. Identical are the facts found here. The former action settled beyond all question that plaintiff received the fertilizers and that they were of value to him. Applying the reasoning of the Court above, if they were of value they could not have been useless, and if of use they could not have been harmful. Value and harm are antipodal terms. They cannot co-exist in the same material. The former action having found that the fertilizers were valuable, if the plaintiff is now allowed to recover in this action he must necessarily impute error to the former finding of a court of competent jurisdiction, a thing which, according to the authorities and as a matter of public policy, he will not be allowed to do."

The view of the Chief Justice, concurred in by Mr. Justice Jones, in this dissenting opinion is not only in accord with sound reason, but is sustained by the textwriters, by the decisions of this and other Federal Courts, by the decisions of the Courts of other States, and even by previous decisions of the Supreme Court of South Carolina.

The controlling principle in a case of this character is thus clearly stated by Mr. Black in his work on Judgments (Vol. 2, Sec. 767):

"*Where* judgment goes against the defendant, and he afterwards *sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are INCONSISTENT with the facts on which plaintiff recovered in the first action or in DIRECT OPPOSITION to them, the former judgment is a bar.* In other words, *if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, THAT NEGATION MUST BE MADE GOOD WHEN THE FACTS ARE FIRST SET UP. For afterwards he cannot deny what the judgment affirms to be true.*" (Italics added.)

Again in 23 Cyc., 1202, we find it stated that "*where the subject-matter of the set-off or counter-claim was involved and adjudicated in the former action in such wise that the judgment therein NECESSARILY NEGATIVES the facts on which defendant would have to rely in order to establish his demand," such set-off or counter-claim cannot be used as a second action, but is forever barred by the first.* (Italics added.)

Apply the test here laid down, and the conclusion is inevitable that the judgment in the United States Court both bars and estops this suit. *On no possible theory can Kirven recover without denying what that judgment affirms to be true. That judgment solemnly declares there was no failure of consideration, and it is utterly impossible for Kirven to have a verdict in this case without showing there was a failure of consideration. We do not perceive how mathematical demonstration could be more conclusive.*

The decisions of this Court announce the same doctrine. Thus in *New Orleans vs. Citizens' Bank*, 167 U. S., 371, 396 (42 L. Ed., 210), Mr. Justice White states the rule in these words:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both

cases, but it exists even although there be different demands, *when the question upon which the recovery of the second demand DEPENDS*, has, under identical circumstances and conditions, *been previously concluded by a judgment between the same parties and their privies.*" (Italics added.)

This statement of the rule was approved and followed in *Werlein vs. New Orleans*, 177 U. S., 397 (44 L. Ed., 820).

In *Bienville Water Supply Co. vs. Mobile*, 186 U. S., 212, 217 (46 L. Ed., 1134), we find this:

"There is such a similarity between the two suits commenced by plaintiff on February 21, 1899, as suggests a question whether the decision of the one should not be conclusive as to the disposition of the other. The parties were the same. In each the plaintiff set forth its charter and its contracts with the city, and each prayed a decree restraining the city from building or operating any system of water works for supplying the city. It is true the bill in the first case counted specially on the contracts made between the plaintiff and the city, and sought a restraint of the city only during the life of those contracts, while the bill in this case sets up more at large the charter rights of the plaintiff as given by the statutes of the State, contends that those rights are infringed by the subsequent legislation of the State and the action of the city thereunder, and seeks to restrain the city during the twenty years named in the plaintiff's charter and until the city shall buy the plaintiff's plant. But each of these seeks to restrain the city from the time of filing the bill. *All the rights which the plaintiff had* by virtue of its charter, and all the violations of such rights caused by the legislation of the State and the action of the city, *existed at the time of the filing of the bills* and during the lifetime of the contracts with the city, and *could have been presented in the first suit and been among the matters to be considered in determining whether the plaintiff was entitled to the injunction sought.* If the plaintiff was not entitled to an injunction during the lifetime of the contracts with the city it is not entitled to any similar relief after the expiration of those contracts. In other words, *the plaintiff failed to set up in the first suit all its grounds of relief.* Can it be permitted in the very relief sought in the prior suit as well as additional relief,

the same in kind though longer in duration? *Will the law permit the splitting up into separate suits or different grounds for the same relief?* Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this Court about seven months before the decision of the present case in the Circuit Court. As against this, it may be said that the decree in the other suit was neither pleaded nor proved, as no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, but we take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as effecting the consideration of this." (Italics added.)

In *Bank vs. Frankfort*, 191 U. S., 499, 514 (48 L. Ed., 282), the Court rules:

"The *thing established* by the Federal decree relied upon here *was the binding and conclusive character of the contract* embodied in the Hewitt Law and its acceptance. That it was such a contract was then adjudicated, and, irrespective of the reasons given for the decision, must remain concluded until the judgment constituting such adjudication is modified or reversed." (Italics added.)

So in *Fayerweather vs. Ritch*, 195 U. S., 276, 301 (49 L. Ed., 211):

"The State Court was one of competent jurisdiction, and the present contestants were before that Court, taking part in the litigation. *The validity of the releases was put in issue by the pleadings, and no judgment could properly have been rendered without a determination of that question.* The colleges sought to enforce a secret trust, but the property covered by the trust, together with that passing under the ninth article of the will, was the bulk of the estate—far more than half. Such a disposition of the testator's property was in contravention of the laws of New York. They who would take the estate in case of intestacy had a right to object to the enforcement of the trust. Only on condition that they waive their objections

and releases could it be sustained. The judgment enforced it. *It, therefore, practically determined that the releases were valid, and decided against the contention of these plaintiffs, that they were fraudulent and void.*" (Italics added.)

Gunter vs. A. C. L. R. Co., 200 U. S., 273, 290 (50 L. Ed., 486), rules:

"To admit it would destroy the effect of the thing adjudged, resulting from the decree in the Pegues case, since *all defenses then existing* to the asserted right of exemption, *whether brought to the attention of the Court or WAIVED, were forclosed by the decree.*" (Italics added.)

In *United States vs. California and Oregon Land Co.*, 192 U. S., 355 (48 L. Ed., 476), the facts were these: In 1889 the United States entered suit in the United States Circuit Court for the District of Oregon against the California and Oregon Land Company to have the patents to certain land declared void, but failed, the Court finding the patents to be valid and the land company a purchaser for value without notice. This suit was brought under the terms of the Act of Congress of March 2, 1889, which authorized the Court to render judgment of forfeiture with respect to certain lands granted by the United States, through the State of Oregon, for building military roads, and also to confirm the title of *bona fide* purchasers of said lands. The United States then brought this suit to declare the patents to the same lands void, on the ground that such lands were within the Klamath Indian Reservation, and, therefore, were lands reserved to the United States within the proviso of the Grant of July 2nd, 1864, to the State of Oregon, by which they had been granted to the Oregon Central Military Road Company, from which the land company acquired them. The lower court held the judgment in the former suit was not conclusive, but on appeal this was reversed, the Court saying:

"On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute would be a bar. The parties, the subject-matter, and the relief sought all were the same. It is said, to be sure, that the United States now is suing in different character from that in which it brought the former suit. There it sued for itself—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. It would be true of a suit by an executor as compared with a suit by the same person on his own behalf. But that is because in theory of law the executor continues the *personna* of the testator, and therefore is a different person from the natural man who fills the office. This is recognized in *Leggott vs. Great Northern R. Co.*, L. R. I. Q. B. Div., 599, 606, cited for the United States. Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. See *Werlein vs. New Orleans*, 177 U. S., 390, 400, 401, 44 L. Ed., 817, 822, 20 Sup. Ct. Rep., 682. *The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means*—that is to say, by evidence that the lands orginally were excepted from the grant. But *in this, as in the former suit, it seeks to establish its own title to the fee.*

"It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi. Phosphate Sewage Co. vs. Molleson*, 5 Ct. Sess. Cas., 4th Series, 1125, 1139, although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. S. C. L. R., 4 App. Cas., 801, 820. *But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim* (*Fetter vs. Beale*, 1 Salk., 11; *Trask vs. Hartford & N. H. R. Co.*, 2 Allen, 331; Freeman, Judgm., 4th Ed., Secs. 238, 241), *and, a fortiori, he cannot divide the grounds of recovery.* Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed, was barred as to all by the decree." (Italics added.)

Here the question set at rest by the first judgment was the validity of the title to the lands just as in the case at bar it was the good quality of the fertilizers; hence if the title to the lands could not be relitigated, the quality of the fertilizers cannot be.

In *Northern P. R. Co. vs. Slaght*, 205 U. S., 122 (51 L. Ed., 738), the facts were these: In 1887 the Northern Pacific Railway Company, claiming to be the owner of certain lots in Palouse, Wash., conveyed the same to W. S. Powers, who later conveyed to the Spokane & Palouse Ry. Co. a right of way 200 feet wide across these lots. The Spokane & Palouse R. Co. and others then brought an action of ejectment against Slaght, alleging that they had a fee simple title to the premises by reason of a grant to the Northern Pacific R. Co. by Act of Congress of July 2, 1864. This suit resulted in a judgment in favor of Slaght. The Spokane & Palouse R. Co. then conveyed all of its property to the Northern Pacific R. Co. Slaght then brought an action of ejectment against the Northern Pacific R. Co., and that company claimed the right of way under the Act of Congress of March 3, 1875, and by adverse possession, *neither of which had been set up in the former suit.*

Slaght interposed as a bar to these defenses the judgment in his favor in the former suit, and this was sustained. The Court said:

"The question now to be decided is, is the decree in the suit *res judicata?* Against this effect of the decree the railway company urges that it was rendered on demurrer and 'the estoppel extends only to the very point raised in the pleading, and does not bar another action based upon other facts.' The effect of the decree, it is insisted, was only to decide against the title specially set forth in the pleading. And further 'in this action (that at bar) the right asserted is a perpetual easement or way by virtue of the Act of 1875 through the lands involved in the former suit. Not only was this right *not pleaded* in the former complaint, but *under it the title now asserted could not have been proved.*' To sustain these conclusions the following author-

ities are cited: *Wiggins Ferry Co. vs. Ohio & M. R. Co.*, 142 U. S., 396, 410, 35 L. Ed., 1055, 1060, 12 Sup. Ct. Rep., 188; *Gilman vs. Rives*, 10 Pet., 298, 9 L. Ed., 432; Freeman Judgm., 4th Ed., 267; Van Fleet, Former Adjudication, Sec. 306, and following.

"The citations are not apposite to the present controversy. It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould vs. Evansville & C. R. Co.*, 91 U. S., 526, 23 L. Ed., 416; *Bissell vs. Spring Valley Twp.*, 124 U. S., 225, 31 L. Ed., 411, 8 Sup. Ct. Rep., 495; Freeman Judgm., Sec. 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of *the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated.* * * * This doctrine has illustrations in suits to quiet title. It was decided in *Parrish vs. Ferris* (*Doe Ex-Dem. Parrish vs. Ferris*), 2 Black, 606, 17 L. Ed., 317, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, determines the merits of the plaintiff's title as well as that of the defendant. In *Indiana B. & W. R. Co. vs. Allen*, 113 Ind., 581, 15 N. E., 446, it was held that the railway company could not assert against a judgment decreeing title in the plaintiff in such an action the right to construct and maintain a railway over it. And in *Davis vs. Lennen* (125 Ind., 185, 24 N. E., 885) it was decided that *every possible interest of a defendant is cut off.* And necessarily every possible interest of the plaintiff is cut off if the judgment is in favor of the defendant. *Parris vs. Ferris, supra.* * * * Whether the Spokane & Palouse Railway Company could have pleaded, in addition to the right it alleged under the deed from Powers, the rights that plaintiffs in error contend it acquired under the Act of Congress of 1875, or the Statute of Limitations of the State, we need not determine. See Secs. 97, 120, 14 L. Ed., 942 *et seq.;* Story Eq. Pl.; *Smith vs. Swormstedt*, 16 How., 288, 14 L. Ed., 942. *It elected between those rights and rights under the Powers deed, and we think its grantee is now bound by that election.* The interest that the Spokane & Palouse Railway Company derived from Powers was of the right of way, which is now claimed by plaintiff in error. In other words, plaintiff in error, as successor of the Spokane & Palouse Railway Company, again asserts title to the very property

that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res judicata* and the cases enforcing and illustrating that principle declare otherwise." (Italics added.)

It is evident that when the Palouse & Spokane R. Co. claimed the premises in fee simple and the judgment went against it, the point determined was that it had no title; and such being the case it would have been absolutely inconsistent with the first judgment to allow title to be established on an entirely new theory. So in the case at bar, failure of consideration has been adjudicated by the former suit not to exist, and this suit, which cannot stand for a moment unless failure of consideration be found, is absolutely barred.

Practically to the same effect are:

Stockton vs. Ford, 18 How., 418 (15 L. Ed., 395).
National, etc., Co. vs. Oconto, etc., Co., 183 U. S., 216, (46 L. Ed., 171).
Southern Pac. R. Co. vs. U. S., 168 U. S., 1 (42 L. Ed., 377).

The gravamen of this cause of action and that in the United States Court are the same, namely, *the quality of certain fertilizers*, and as that quality was determined in the United States Court to be good, it cannot be again called in question. The cause of action here depends upon proof of the *vicious nature* of the fertilizers which *of necessity* has to be *based upon failure of consideration*. But *since by the former suit FAILURE OF CONSIDERATION was necessarily embraced in the issues, the present suit cannot be said to be on a different claim or demand.* On this question, the decision of the United States Su-

preme Court in *Dowell vs. Applegate*, 152 U. S., 327 (38 L. Ed., 463), is conclusive. The Court said:

"The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the controversy that arises, and was determined in the suit in the Federal Court as to the right of Dowell to have all the lands described in his bill subjected to his claims. While the position of the parties is reversed, Daniel W. Applegate, who contested that right, in the suit of the Federal Court—so far as that suit related to the lands then claimed by him, including the 40 acres here in dispute—seeks, under the guise of a new suit, to obtain a re-examination, not upon any ground of fraud in obtaining that decree, but in the light simply of the conveyance of October 8, 1874, from W. H. H. Applegate, *which conveyance, although existing before Dowell commenced his suit, indeed, before Dowell acquired any judgment lien of record, he deliberately refrained from bringing to the attention of the Federal Court, in some appropriate form, in support of his defense. The presenting in this suit of the fact of that conveyance for the purpose of showing that the 40 acres in question should not have been subjected to sale for Dowell's demands, does not, within the rule announced in the case above cited, make a different claim or demand. On the contrary, the matter now presented was embraced by the issues in the suit in the Federal Court, and was then determined,* when that Court, upon final hearing, adjudged that the 121.55 acres (which embraced the 40 acres now in dispute) should be sold to pay Dowell's claims. *The case consequently comes within the rule that 'a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.'"* (Italics added.)

To the same effect is *Werlein vs. New Orleans*, 177 U. S., 390 (44 L. Ed., 820).

A notable case on the subject is *Eastern Building & Loan Association vs. Welling*, 116 Fed., 100 (C. C.). It appears that Welling and Bonnoit applied to the Eastern Building & Loan Association of Syracuse, N. Y., for 50 shares of its

capital stock. This application was granted and certificates issued to them, making them stockholders, expressly subject to all the rules and by-laws of the corporation. Subsequently they applied for a loan of $5,000 and received $4,500. Before completing the loan, Welling & Bonnoitt executed seventy-eight promissory notes, payable from month to month, and extending over a period of seventy-eight months. To secure these notes they executed a mortgage of a certain tract of land in Darlington County. All of the notes were paid but the last, and when that became due the full sum of it was tendered, together with the costs of entry of satisfaction, and satisfaction demanded to be entered. These tenders were refused. Whereupon Welling and Bonnoitt, three months afterwards, brought their action in the Court of Common Pleas for Darlington County, S. C., against the mortgagee to recover the penalty provided in the Act of South Carolina as to refusal to accept the amount due on a mortgage. The building and loan association, having been served with a summons, entered its appearance and filed its answer to the suit. Its defense was that this advance or loan was effected to the plaintiffs as stockholders in a mutual association; that it was governed wholly by the by-laws of the association and the terms of its charter, all of which entered into and were a part of the contract; that the mortgage did not secure merely the notes therein specified, but that it was an indemnity and security to the association for the performance by the borrowing stockholder of all his obligations to the association, and that among these was an obligation to pay his dues, as provided by the by-laws, until the stock of the association had reached par; that although the notes of the plaintiffs had been paid in full, yet the stock of the association had not reached par, and so the obligation of the borrowing stockholder, secured by this mortgage, had not been released and satisfied.

The case came to trial and resulted in a verdict and judgment for Welling & Bonnoitt. The effect of this judgment was that mortgage had been satisfied and that such satis-

faction should be entered on record. On appeal this judgment was duly affirmed by the Supreme Court.

Meanwhile the Building and Loan Association brought an action against Welling & Bonnoitt in the United States Circuit Court to foreclose the same mortgage, contending that Welling & Bonnoitt were stockholders in the association, and that the mortgage was not only intended to secure the loan made to them, but also the full performance by the borrowing stockholders of all their contracts of subscriptions and loan with the association. The prayer of the bill was that the mortgage be reformed and the errors, omissions and mistakes therein corrected, so that it should express the true intent and meaning of the parties, and that a decree of foreclosure be made in accordance with the true intent and meaning of the parties and of the articles of incorporation and by-laws of the association.

Such being the purpose of the second suit, it was contended by the defendants that the question of the satisfaction of the mortgage was rendered *res judicata* by the judgment in the former suit in the State Court. This plea of *res judicata* was sustained, Judge Simonton using this language:

"In the case before us, the parties to the former action and to this action are precisely the same. The controlling question in the former action was whether the mortgage had been satisfied, the defendant in that action holding that it was not satisfied. *The plaintiff could not possibly recover unless it was satisfied. The present bill proceeds upon the idea that the mortgage has not been satisfied.* This is the crucial question in the case. *It cannot recover if the mortgage was satisfied.* So in both cases the controversy was and is the same. Was this controversy decided in the law case under identical circumstances and conditions as now surround it? In the law case the building and loan association introduced in evidence its charter, by-laws, certificates of stock, contracts on the subscription and loan, all of these to sustain the position that the mortgage was not satisfied. In this bill it sets up the same matter for the same purpose, with a further ground that if the mortgage is satisfied by the payment of the notes, that

instrument was executed, delivered and accepted under a mistake, was prepared under unlawful action of the officers of the corporation, and was *ultra vires.* * * *

"There are cases in which it is held that a defendant who could have set up a counter-claim by way of defense, and concludes not to do so, is not precluded from bringing an action on the subject-matter of the counter-claim. But the defense here was not a counter-claim. A counter-claim is somewhat in the nature of a plea of confession and avoidance. It proceeds on the idea that if the demand of the plaintiff can be sustained, or whether it be sustained or not, the defendant himself has a good claim against the plaintiff, which can be offset against that of the plaintiff if plaintiff be sustained, or if plaintiff fail to prove his case, will entitle the defendant to a judgment against him for the sum demanded in the counter-claim. It is, as it were, aside of the claim of plaintiff, and it can be sustained whether the demand of the plaintiff be or be not sustained. *But in the case at bar the defense in the State Court and the relief sought in this Court goes to the very root of the case made by Welling and Bonnoitt. Talbot vs. Padgett,* 30 S. C., 171, 8 S. E., 845. *If this present complainant is right, then Welling and Bonnoitt had not a shadow of a right to the relief they asked. It is impossible for the case of Welling and Bonnoitt to stand in any particular, if the position of the Eastern Building and Loan Association be sustained at all.* To sum up the matter: In the action in the State Court of Welling and Bonnoitt against the Eastern Building and Loan Association of Syracuse, N. Y., the sole question was, was the mortgage satisfied, all its conditions having been fulfilled? In the case at bar the sole question is, is this a valid subsisting mortgage, whose conditions have been broken? In the action in the State Court, under the prevailing practice, the defendant could have set up the legal defense that, by its terms and the contracts between the parties, the mortgage was not satisfied, or, if there were a mistake in the draft of the mortgage, he could set up in the same answer his equitable defense, and have prayed a correction of the mistake and a reformation of the deed. On proper proof, this affirmative relief could have been allowed him." (Italics added.)

So in the case at bar, the relief sought goes to the very root of the case made by the Virginia-Carolina Chemical

Company in the United States Court, and if the present plaintiff is right it had not a shadow of right to the relief it asked. This makes the first judgment conclusive of the question here sought to be litigated.

Directly in point also is *Price vs. Dewey*, 11 Fed., 104, 106 (C. C.), where the Court uses this language:

"In the case in New York all the facts, which constituted this alleged fraudulent conspiracy of Payne & Dewey, were set out and distinctly averred, and if they were true, as stated in the complaint, they would have entitled the party to relief. He did in fact seek damages. He alleged that immediately after the transfer of the property enough of it was sold to realize $300,000. It was alleged that the nominal consideration was $130,000 or $135,000, but that the defendants, Payne & Dewey, immediately sold enough to realize $300,000. The plaintiff asked for judgment damages, it is true. But he alleged that the property was worth half a million of dollars, and that he had sustained damages to that amount—the whole value of the property. So, also, the facts alleged in that complaint justified on account. All that was wanted was a mere change in the form of a prayer. But even that was not necessary in New York, because the defendant appeared in the action and answered; and by a provision of the Code of Procedure of that State, when a defendant appears and answers, any relief may be granted that is properly embraced within the issues. The fact that the plaintiff chose to demand damages, instead of a decree for an account, does not affect the transaction. If he had recovered it would have, undoubtedly, concluded the present action. The same result should follow in the contrary alternative. The fact that the transactions were not closed until long after that suit was brought does not affect the question, because, if he is entitled to an account of the proceeds of that property, and for the reason that the property was his. If he had maintained his action at the time he brought it in New York, he would have been entitled to an account of the proceeds of the property already sold, if he had asked it, and a reconveyance of the unsold remainder. Or, if he preferred to recover damages, he would have recovered at least the full value of all the property lost by the acts complained of, so that the fact that sales were made by the parties fraud-

ulently obtaining the title after the commencement of that suit does not affect the question. He could have got full relief at that time. As I look at it, *there could have been no verdict and judgment in favor of Payne & Dewey at that time under the allegations of the complaint, and the issues made by the answer, without finding and adjudging the issue as to the fraudulent transfer of the property in their favor. That was the basis and gravamen of the action, and it is the same in this suit.*" (Italics added.)

The decisions of the State Courts are strong in support of the principle.

Thus in *Nemetty vs. Naylor,* 100 N. Y., 562, it is said:

"It cannot be denied, we think, that the adjudication in the summary proceedings was a final determination as to the rights of the parties to the premises under the lease or contract existing between them. Either the plaintiff or the defendants had a right to the possession of the premises, if, under any agreement, the plaintiff had such a right she could not be dispossed or removed. Any agreement which authorizes her to keep possession was a perfect defense to the summary proceedings for her removal, and if such an agreement existed no judgment of removal was authorized. Such agreement not having been set up or proved, the plaintiff is not in a position to claim she had a right to the possession of the premises. She has had her day in the court with full opportunity to be heard and to assert and protect her rights, and, having failed to do so at the proper time, the record of the proceedings, upon which she might have done so, is a bar to her right to recover in this action. *The judgment is conclusive that no other tenancy existed than that which was claimed in a proceeding had,* and also as to the rent due and unpaid and the holding over after default in its payment.

"*The plaintiff's claim in this action rests entirely upon a verbal agreement which was inconsistent with the written lease under which the proceedings were had to remove her,* which verbal agreement included a suspension of the payment of rent until certain alterations and repairs were completed. She proved that these were not done when she was removed under the proceedings had against her.

"*The judgment established the lease set forth in the affidavit which upheld the landlord's right to the possession*

of the premises, and which was in entire conflict with any verbal or different agreement. The written and verbal contracts were antagonistic to each other and could not stand together, and as the claim of the plaintiff results from the alleged parol contract, *the existence of which is in direct conflict with the judgment* between the same parties, it cannot be enforced in this action." (Italics added.)

A case very much in point is *Reichert vs. Krass,* 41 N. E., 835 (Ind.). There the Court uses this pertinent language:

"If the issues are so formed *as that a counter-claim is in fact litigated,* the defendant will not be permitted afterwards to sue and recover upon the same. Such questions as are within the issues, or such as are essential to a complete determination of the points presented by the complaint, are of necessity adjudicated. *Howe vs. Lewis,* 121 Ind., 110, 22 N. E., 978. This action is not a suit on a common count to recover money due under a special contract, but it is a suit on the contract itself, alleging full performance on the plaintiff's part. The breach set up in the counter-claim was necessarily involved in the complaint. * * * *If appellant's contention should prevail, we might have this anomalous condition: The court, in trying the issues joined on the complaint, might find that the plaintiff had fully complied with the contract on his part, and the jury, in trying the issues joined on the counter-claim, might find that the plaintiff did not comply with all the conditions of the contract, and assess damages for the breach. We would then have two separate, distinct and contradictory findings and adjudications of the same matter in the same action. Such a condition was never contemplated by our Code."* (Italics added.)

In *Blair vs. Bartlett,* 75 N. Y., 150, 31 Am. Rep., 455, the facts were these: A physician sued for services, in a justice's court; the defendant answered, but *withdrew his answer,* and the plaintiff got judgment without contest. Defendant then brought a suit against the physician for malpractice in rendering the services, but it was held that no such suit could be maintained. The Court said:

"It follows, then, that whatever must have been proved and established as facts before the justice of the peace, by the defendant in this action and the plaintiff there, in order to obtain the judgment of the court there in his favor, so much is, so long as that judgment stands unreversed, *res adjudicata* between the parties to that and to this action, and conclusive upon them. Now, it is a rule that after verdict it is to be assumed that every fact was proved upon the trial, which was expressly stated in the declaration, or which was necessarily implied from what was so stated; *Spiers vs. Parker*, 1 T. R., 141; *Jackson vs. Pesked*, 1 M. & S., 234; or which the allegations of the declaration required to be proved. *Nerot vs. Wallace*, 3 T. R., 25. The complaint in the action in justice's court alleged a demand for the same services which are set forth in the complaint in the action now before us, as the malpractice sued for, and that those services were worth the sum of twenty-eight dollars. Those allegations were material, especially that of the value of the services. We must assume, then, that the rendering of the services, and that they were of some value to the plaintiff in this action, was proved. Indeed, the answer of the defendant in this action expressly avers that such proof was made. It is to be taken as true, then, that such proof was made and was passed upon by the justice's court, and that in reaching a judgment for the plaintiff in that action against the defendant there, that court did adjudge and determine that the proof given established the facts of the rendition of the services and that they were valuable to the defendant there. *But if of value, they could not have been useless, and if of use, they could not have been harmful; and if not harmful, there could not have been mala praxis in the performance of them.* Hence, it is *res adjudicata* between these parties that there was not the malpractice on the allegation of which, in this action, the plaintiff here seeks to recover. The same question now raised in this action between these parties has once been judicially decided between them, and the judgment remains unreversed." (Italics added.)

In *Dunham vs. Bower*, 77 N. Y., 76, 33 Am. Rep., 570, the owner of certain goods brought suit against a carrier for damages for failure to transport such goods. Previous to that time the carrier had recovered judgment against the owner for the freight on such goods. As the recovery of a

judgment for the freight completely negatived the idea that the goods had not been transported, the Court held that the second action could not be maintained. Chief Justice Church, in delivering the opinion of the Court, uses this language:

"It is sometimes difficult to draw the line between a judgment which will operate as a bar to an action for a specified claim, and one which leaves the claim outstanding to be enforced by a cross action. It depends in a great measure upon the nature of the demand litigated, the relation which the claim sought to be enforced bears to it, and the circumstances attending it. Any fact or allegation which is expressly or *impliedly* involved in a judgment is merged in it, and cannot again be litigated. Upon this principle the so-called malpractice cases were decided. *Gates vs. Preston*, 41 N. Y., 113; *Bellinger vs. Craigue*, 31 Barb., 534, and which have been approved in the recent case of *Blair vs. Bartlett*, 75 N. Y., 150; s. c., 31 Am. Rep., 455. It was held in these cases that the question of care and skill of a physician, or surgeon, is necessarily adjudicated in an action to recover compensation for the services rendered, and a judgment for such services is a bar to an action for damages, based upon a want of proper care and skill. So in *Collins vs. Bennett*, 46 N. Y., 490, it was held that a judgment in an action to recover compensation for keeping a horse, was a bar to an action for a conversion of the horse founded upon using and driving him contrary to the agreement, upon the ground that *the recovery necessarily adjudged a performance of the contract.* I think that the principle decided in that case applies here. The action for freight in transporting the apples adjudged that the plaintiff in that action had performed his contract, except to the extent that he was excused by the freezing of the canal. It is urged that the cause of action in this case was independent of the contract of shipment. It seems quite clear that it was a part, and a very essential part, of that contract. The time of starting was made important by the parties, and a violation of the agreement in that respect caused, as it is alleged, the freezing and destruction of the property transported. *If this had been shown, it would have defeated the whole cause of action before the justice of the peace, either upon the contract, or upon a quantum*

meruit. It would have shown that the pretended service was of no value, and after defeating that action the defendant would have been at liberty to have sued for his damages.

"If the allegations in this case are true, the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages. I do not see how a right to freight and a right to damages for the destruction of the whole property caused by a violation of the shipping contract can co-exist. * * *

"There may be cases where the principle of recoupment would apply, but does it apply when the fact upon which it is alleged is necessarily fatal to the whole action? I think not. We must decide this case upon its own facts, and it seems to us that if the allegations of the complaint in this case are true, the defendant could not have legally recovered for freight, and this whether damages ensued or not to the property. The recovery, therefore, adjudicated either that the defendant never made the alleged agreement or that he had performed it. These questions were *necessarily involved* in that action, and are merged in the judgment." (Italics added.)

In *Gibson vs. Bingham*, 43 Vt., 410, 5 Am. Rep., 289, it was held that where a judgment is obtained by the vendor for an unpaid balance of the contract price of a specially manufactured article is a bar to an action by the vendee to recover for a breach of the contract, the Court saying that, "this perpetual oscillation, by alternate suit of parties litigant, upon the same subject-matter, if sustained, would be a judicial discovery of a 'perpetual motion' which all philosophy has failed to reach."

In *Rew vs. Independent School District*, 106 Am. St. Rep., 282, 284 (Ia.), this statement of the rule is found:

"The decision of a court having jurisdiction of the parties and subject-matter is conclusive in another court in an action between the same parties, not only as to the same cause of action, but as to other causes of action involving the right or title asserted and the defenses interposed in the court in which such decision was rendered. * * * Nor is the binding effect of the previous adjudication

limited to those matters which are expressly determined in the final judgment, but it covers also matters *collaterally involved, which are necessarily determined in reaching the final judgment: National Foundry Works vs. Oconto Water Supply Co.*, 183 U. S., 216, 234; *Aetna L. Ins. Co. vs. Board of Comm'rs*, 117 Fed. (C. C. A.) 82." (Italics added.)

In reaching its judgment upholding the validity of the note, the United States Circuit Court necessarily determined that there was no failure of consideration; yet that is the very foundation of the present action.

Prior to the rendition of the final judgment in this case, the decisions of the Supreme Court of South Carolina gave support to the principles that we deem conclusive here. Thus in *Willoughby vs. Railroad Company*, 52 S. C., 175, the following clear statement of the law taken from Bigelow on Estoppel is quoted with approval:

"It is a well-established rule of law, sanctioned as well by policy as by precedent, that every material fact established in an issue must be regarded as determined by the final judgment in the action, and cannot be revived in any subsequent proceedings between the same parties. The rule in this case is that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication may be, is ruled upon as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, or in admiralty, when either party, or the privies of either party *allege anything inconsistent with it;* and this, too, whether the subsequent suit is upon the same or a different cause of action." (Italics added.)

And in *Ryan vs. Association*, 50 S. C., 187-188, it is said:

"The question, then, is, can a suit be maintained under Section 1391, Rev. Stat., for double the sum of interest received in excess of lawful interest, where the only evidence of receipt of usurious interest was the receipt of the proceeds of a judgment and sale in foreclosure, in a suit on a contract to which the defense of usury might have been interposed. We think it clear that such a suit cannot be maintained. A judgment is the final determination of

the rights of the parties in the action (Code, Sec. 266), and *is conclusive of all matters necessarily involved*, WHETHER RAISED OR NOT, ESPECIALLY IF THE PARTY DENYING THE ADJUDICATION KNEW OF THE MATTER AND COULD HAVE INTERPOSED IT AT THE PREVIOUS TRIAL, EITHER IN SUPPORT OF A CLAIM OR AS A DEFENSE. *Ruff vs. Doty*, 26 S. C., 178. While it is true, as a general rule, that usury is not available as a defense unless pleaded (*Bank vs. Miller*, 39 S. C., 193). yet *since usury goes to defeat the recovery in whole or in part, and is necessarily based upon or connected with the contract sued upon, and in the affirmative proof upon the contract must be impliedly but necessarily negatived, a judgment defendant must be held estopped to affirm usury in the judgment debt, in any subsequent suit involving the existence of such usury as a fact.*"

Here it will be observed the decision is placed upon the express ground that the recovery on the contract negatived usury and estopped the judgment defendant from attempting to recover usury by any subsequent suit. Plainly the reason for the ruling was the absolute *inconsistency* the two judgments would have to each other, which makes it much in point here. In fact, Chief Justice Pope cited it in his dissenting opinion as authority for the view for which we are now contending.

Testing this case by the principles established by these authorities, we think it clear beyond controversy that this suit cannot be maintained. In the first place, Kirven is absolutely estopped for the reason that the judgment of the United States Court conclusively determined that failure of consideration did not exist, it being a defense that could have been litigated, was necessarily involved, and in fact was set up and afterwards withdrawn or abandoned. *The present action cannot be sustained unless failure of consideration be found to exist, and this cannot be done without failing to give effect to the judgment of the United States Circuit Court.* Hence that judgment is an estoppel.

In the second place, Kirven is absolutely barred from maintaining the action. The second cause of action depends on the negation of an issue embraced in and deter-

mined by the first suit; hence the claims or demands in the two suits are identical, bringing the second squarely within the rule as to a bar.

For these reasons, this action cannot be sustained without depriving the Chemical Company of a right under the laws of the United States by virtue of a decision of the United States Circuit Court solemnly adjudicating that the fertilizers sold Kirven were neither negatively worthless nor positively vicious.

We therefore respectfully submit that the dissenting opinion delivered by the Chief Justice and concurred in by Mr. Justice Jones correctly stated the law applicable to this case, and for the reasons therein given, so amply supported by authority, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED.
APR 24 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]18.

VIRGINIA-CAROLINA CHEMICAL COMPANY,
PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

BRIEF FOR THE DEFENDANT IN ERROR.

W. F. STEVENSON,
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(20,880.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 189.

VIRGINIA-CAROLINA CHEMICAL COMPANY,
PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The Virginia-Carolina Chemical Company, plaintiff in error, is a foreign corporation carrying on the business of manufacturing and selling fertilizers in several of the Southern States, including South Carolina. J. P. Kirven, defendant in error, is a planter in Darlington county, in the State of South Carolina. In the year 1898 Kirven purchased from the plaintiff in error a considerable amount of fertilizers, a part of which was sold to persons engaged in agriculture, to whom he was making advances, and a part thereof was used upon his own crops of cotton, corn, and tobacco. Owing to serious injury to his crops, alleged by him to have been occasioned by the negligent manufacture of said fertilizers, Kirven declined to pay the note he had given for the pur-

chase price of such fertilizers. In the fall of 1898 the plaintiff in error undertook to enforce an agricultural lien, which Kirven had given upon his crops to secure the note given for the purchase price of such fertilizers, by attachment of his crops. Kirven resisted said attachment under the laws of South Carolina, claiming that the said fertilizers were not only worthless, but had caused him serious damage by the reason of negligent manufacture thereof. The issues thus made were tried before the Court of Common Pleas for Darlington County and a jury, and resulted in a verdict for the defendant, Kirven, from which an appeal was taken to the Supreme Court of South Carolina, which court reversed such judgment on the ground that no allowance was made to the plaintiff in error for kainit, which was admitted to be good and remitted the case for a new trial. The plaintiff in error thereupon, on the coming on of the case for trial, elected to discontinue its action.

Thereafter Kirven brought this action for damages occasioned by the negligent manufacture of such fertilizers so sold him by the plaintiff in error, alleging that such fertilizers destroyed the crops in large part and thereby damaged him in the sum of $1,995.00. While this action was pending and before trial, the plaintiff in error brought an action in the Circuit Court of the United States for the District of South Carolina upon the note given by Kirven for the purchase price of said fertilizers, and the answer of Kirven to the complaint in this action, upon which issue was joined and the case tried, did not set up failure of consideration or the worthlessness of the fertilizers in question, but relied upon purely legal defenses, namely:

First. That the plaintiff in said case, being a foreign corporation and not having complied with the laws of the State of South Carolina in regard to the carrying on of business by such corporations in said State, could not maintain the action.

Second. That the note in question was given to S. M. McCall individually, and that he having assigned the said note to the plaintiff, it could not as assignee maintain said action against the defendant.

Third. Defendant set up a counter-claim for $2,450.00, the value of seventy bales of cotton seized and appropriated by the plaintiff to its own use. The first answer filed to this complaint did set up a failure of consideration, but such defense was afterwards withdrawn by permission of the court, and such defense was not an issue in the case. This action eventuated in a judgment for the plaintiff for the sum of $911.07.

Thereafter the plaintiff in error served a supplemental answer in the action wherein Kirven sought to recover damages to his crops, claiming that the judgment on the note recovered in the Circuit Court of the United States was *res adjudicata* of the issues involved in the last-named action; but neither in said answer nor in any motion or proceeding before the trial court—that is to say, the Court of Common Pleas for Darlington County—was it contended that said judgment should be held *res adjudicata* of such issues on account of the full faith and credit clause of the Constitution of the United States, nor was the trial court given to understand that it was deciding a Federal question. The pure and simple question raised by said answer and in the trial of the case was one of general law, as to whether under the laws of the State of South Carolina, and especially under the provisions of the court of procedure of said State, the judgment in the United States Circuit Court was based upon the same cause of action, and whether the defense of failure of consideration must have been set up or was necessarily involved in said judgment rendered in the Circuit Court. The trial judge held that such judgment was not *res adjudicata;* that a proper construction of the provisions of the Code of Civil Procedure of the State of South Carolina did

not require the defendant to set up failure of consideration or defendant's power of bringing action for damages to his crops occasioned by said fertilizers.

The jury having found a verdict for the defendant, Kirven, in his action for damages for the amount claimed, the defendant in said case, the plaintiff in error here, appealed to the State Supreme Court, amongst other grounds, upon the ground that the said judgment in the Circuit Court of the United States was conclusive of the issues involved in the suit for damages. But it will be noted that in said appeal the ground of exception sets out that the court "thereby denied to the defendant a right arising under the authority of the United States," and did not specify that the failure to hold said judgment conclusive of the issues on trial was a failure to give full faith and credit to the judgment of the Circuit Court.

The Supreme Court of South Carolina did not decide any Federal question against the plaintiff in error here, but simply held in construction of the Code of South Carolina that it was not necessary to set up the plea of failure of consideration in the Circuit Court of the United States, and that as a matter of law the cause of action upon the note was a different cause of action from the cause of action for damages set up and decided in the present case, and therefore affirmed the judgment of the Court of Common Pleas for Darlington county.

FIRST.

It is submitted that this court is without jurisdiction to review the decision of the Supreme Court of South Carolina.

Nowhere in the record is the position clearly presented that full faith and credit was not given to the judgment of the Circuit Court of the United States, but, on the contrary, in the exceptions on appeal to the State Supreme Court, error is alleged as follows in respect to the ruling of his honor the trial judge:

"In that he failed and refused to give proper and full credit to the judgment of the United States, rendered in the case in the Circuit Court, and thereby denied to the defendant a right arising under the authority of the United States."

And in the writ of error to this court the same ground in almost identically the same language is set forth.

Such a general statement is absolutely insufficient to raise a Federal question that full faith and credit was not given to the judgment of the Circuit Court of the United States under the Constitution.

A general statement that a decision is against the constitutional rights of a party or against a certain section of the Constitution, or that there has been a failure to give full faith and credit to a judgment, is not sufficient of itself to raise a Federal question so as to give this court jurisdiction.

Clark *v.* McDade, 165 U. S., 168 (41 L. R., 673).
Chicago N. W. R. Co. *v.* Chicago, 164 U. S., 454 (41 L. R., 51).
Pim *v.* St. Louis, 165 U. S., 274 (41 L. R., 715).
Zadic *v.* Baldwin, 166 U. S., 488 (41 L. R., 1088).
Thomas *v.* State of Iowa, decided March 23, 1908.

In the last cited case we quote the following:

"The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for a writ of error from this court or in the assignments of error here (Montana *ex rel.* Haire *v.* Rice, 204 U. S., 291; 51 L. Ed., 490; 27 Sup. Ct. Rep., 281). All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they 'in effect deprived the plaintiff in error of his liberty without due process of law;' and that the question thus raised was discussed before the Supreme Court of the State. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State courts to give us the limited authority to review their judgments which exists under the Constitution and is regulated by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). A mere

claim in the court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment to the Constitution."

Clarke *v.* McDade, 165 U. S., 168, 172; 41 L. Ed., 673, 674; 17 Sup. Ct. Rep, 284.

Miller *v.* Cornwall R. Co., 168 U. S., 131, 134; 42 L. Ed., 409, 410; 18 Sup. Ct. Rep., 34.

Harding *v.* Illinois, 196 U. S., 78, 88; 49 L. Ed., 394, 397; 25 Sup. Ct. Rep., 176.

We therefore submit that this writ of error should be dismissed for want of jurisdiction.

SECOND.

There was no Federal question decided by the Supreme Court of South Carolina, but simply a question involving a general principle of law as to whether the judgment of the Circuit Court of the United States upon the note given by Kirven to the plaintiff in error was conclusive in his action for damages to the crops by the fertilizers purchased.

The trial court and the State Supreme Court of South Carolina did not question the full force and effect of the judgment of the Circuit Court of the United States, but, while fully recognizing such force and effect, decided simply as a matter of general law that such judgment was not conclusive of the issues in the present action. This does not raise a Federal question.

A decision which does not deny the validity of a judgment of the Circuit Court of the United States, but simply decides what was the true cause of action therein, is certainly deciding merely a question of general law, and such action does not amount to a decision against the full faith and credit claimed for such judgment.

Johnson *v.* N. Y. L. Ins. Co., 187 U. S., 491 (L. R., 47, 273).

Eastern B. & L. Asso. *v.* Williamson, 189 U. S., 126 (L. R., 47, 739).

San Francisco *v.* Itsell, 133 U. S., 65.

In the case last cited it was distinctly held that where a high court of a State simply decides against the plaintiff in error the issue whether the former judgment was a bar to the action, that was a question of general law only, in no wise depending upon the Constitution, treaties, or statutes of the United States.

THIRD.

Even if a Federal question had been involved and had been decided against the plaintiff in error, there are other grounds upon which the decision of the Supreme Court of South Carolina rests sufficient to sustain the judgment.

It was contended before that court and before the trial court that under section 170 of the Code of Civil Procedure of South Carolina that the defendant Kirven was required to set up his damages in his answer to the plaintiff in the Circuit Court of the United States, and that his failure to do so operated as estoppel. The Supreme Court of South Carolina ruled to the contrary, holding that the defendant Kirven had his election to set up such damages by way of a counter-claim in the United States Circuit Court, or to bring separate action therefor. This was a construction of the State law by the highest State tribunal, and is sufficient of itself to sustain the judgment of that court against the plea of *res adjudicata* set up by the defendant in that case, the plaintiff in error here.

Moreover, the State Supreme Court determined that the cause of action in the suit in the Circuit Court of the United States was a breach of the promise to pay the note, and the cause of action in the present case was for damages arising out of the injury done to his crops by the fertilizers. And, inasmuch as no issue as to failure of consideration was involved in the case in the Federal court, it was not adjudicated by that judgment that there was no defect in the fertilizers nor damages to defendant's crops from their use. This was distinctly a general provision of law not involving any Fed-

eral question whatever. This court has repeatedly decided that the decision by a State court of a Federal question adverse to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States if another question, not Federal, sufficient to sustain a judgment was also raised and decided against him.

Hammond *v.* Connecticut Mut. L. Ins. Co., 115 U. S., 633.

Brook *v.* Missouri, 124 U. S., 394.

Hale *v.* Akers, 132 U. S., 554.

Haley *v.* Breeze, 144 U. S., 130.

Connecticut *ex Rel.* N. Y. N. E. R. Co. *v.* Woodruf, 152 U. S., 689.

Missouri P. R. Co. *v.* Fitzgerald, 160 U. S., 556.

Chemical Nat. Bank *v.* City Bank of Portage, 160 U. S., 646.

Sillis *v.* Stinchfield, 159 U. S., 658.

It has also been frequently held by this court that where a Federal question is raised and the State court has rested its decision upon other grounds not involving Federal rights, the United States Supreme Court will not take jurisdiction, although it may deem such other grounds unsound.

Clinger *v.* Missouri, 13 Wall., 257.

DeSaussure *v.* Gillard, 127 U. S., 216.

Johnson *v.* Risk, 137 U. S., 300.

And this principle is carried out and applied even where the judgment of the State court rests on two grounds and it does not appear on which of the two grounds the judgment was based, if the non-Federal ground is sufficient to sustain the judgment.

Allen *v.* Arguinbau, 198 U. S., 149.

FOURTH.

The Circuit Court of the United States in this case acquired jurisdiction of the action on the note in question purely on the ground of diversity of citizenship, and therefore the judgment rendered in that court has no greater effect than should be given to the judgment of the State court in like cases. The State law alone was administered in the United States court, the said judgment not being based upon any claim of Federal right whatsoever. This court has frequently held that in such cases the law is as above stated.

The only question involving the law of the United States was whether or not the action could be maintained by reason of the fact that the note had been assigned to the plaintiff in that case and the plaintiff in error here. The State Circuit Court and the State Supreme Court acknowledged the jurisdiction of the United States Circuit Court and allowed that it was a valid judgment; hence the judgment was not based upon any claim of Federal right, but purely upon breach of the promise to pay the note.

We submit that it therefore follows that this judgment will be given no more effect than a domestic judgment.

From this it would seem clearly to follow that the State court, having allowed that the judgment of the Circuit Court of the United States was a valid judgment in all respects and only held that it was not conclusive of the issues in the damage suit, has decided the case solely upon the question of general law not affecting any Federal right whatsoever.

Crescent City Co. *v.* Butchers' Union, 120 U. S., 141.
Hancock Nat. Bank *v.* Farnum, 176 U. S., 640.
Pittsburgh, etc., Co. *v.* Long Island Loan & T. Co., 172 U. S., 493.
Dupasseur *v.* Rochereau, 21 Wall., 130.
Deposit Bank *v.* Board of Councilmen of Frankfort, 191 U. S., 499.

If the judgment in the United States Circuit Court had been a judgment of the State court, certainly the decision of the State court as to its statutes and jurisprudence generally would have been binding and effectual upon the question of whether such judgment was conclusive of the issues raised in the damage suit.

We submit, for the reasons above stated and under the authorities, that it is equally clear that the decision of the State court is binding and final as to the question of *res judicata* and that no Federal question for review by this court is presented.

FIFTH.

It is scarcely necessary to present arguments upon the merits involved in the question of *res judicata* in this action further than to refer to the reasons and authorities presented in the opinions rendered by the State Supreme Court. We respectfully refer to the authorities there cited. I shall only refer, therefore, to a few principles which seem to be well supported by authority and one or two brief quotations therefrom which seem to fully vindicate the position we take upon the general merits of this question, if the court deems it proper to consider it.

It is very clearly established by the overwhelming weight of authority that a recovery upon a contract, express or implied, will not bar an action by defendant for damages caused by negligence in its performance or by its non-performance. The law is also plain that the rules requiring a party to assert all his defenses does not apply to demands against the plaintiff which are properly available by way of set-off or counter-claim. In such a case defendant has his election either to use such demand as a counter-claim or reserve it as a basis of another action. The principle here involved, we submit, is quite plain.

In 1 Van Fleet on Former Adjudication, section 168, the principle is thus clearly illustrated:

"If A enters into a contract with B and fails to perform it, a cause of action arises at once in favor of B to recover dam-

ages which A cannot destroy nor impair by any judicial proceeding. That cause of action is the property of B, with which he may do as he pleases. He may select the time when, and the court in which he will sue. If A sues him upon the contract, it is optional with him whether or not he will set up a counter-claim or cross-demand. This cause of action in favor of B may arise either from the negligent performance or the non-performance of A, or from his misfeasance or malfeasance. In either case the principle is the same."

Again, the same author says, at section 171:

"If A sues B, and the latter has a demand upon which he can maintain an action against the former, the law permits him, within prescribed limits, to plead it by way of counter-claim, cross-demand or set-off. This pleading is not a defense. It neither denies nor confesses and avoids the plaintiff's cause of action. It is simply a cause of action in favor of the defendant, and the court deducts the less from the greater and renders judgment for the remainder. But as the plaintiff has an option in respect to the time and place of suing upon his cause of action, and as the defendant possesses the same option, he is not obliged thus to use his cause. Hence, all the cases agree, that if he exercises his option, and does not use it as a counter-claim, cross-demand or set-off, he can maintain an independent action upon it."

Section 172:

"All the cases agree that a breach of warranty made upon the sale of property, gives the purchaser a cause of action which is not barred because not used as a counter-claim to the suit of the vendor for the price. Thus, in a suit upon a note given for chattels, a judgment by agreement for its full amount, and its payment, does not prevent the defendant from recovering damages for a breach of warranty in the sale."

See also Black on Judgments, section 768.
Davis *v.* Hedges, L. R., 6 Q. B., 687.
Kennedy *v.* Davisson (W. Va.), 33 S. E. R., 292.
Riley *v.* Hale, 33 N. E. R., 491.
Conner *v.* Varney, 10 Gray, 231.
Myrian *v.* Woodcock, 104 Mass., 326.
Gilmore *v.* Williams (161 Mass.), 38 N. E. R., 96.
19 Ency. Plead. & Prac., 731; 24 Am. & Eng. Ency. of Law, 785.

All of these authorities, and innumerable others which might be cited, fully sustain the position for which we contend.

In the case of Gilmore *v.* Williams, *supra*, it was held by the Supreme Judicial Court of Massachusetts that a judgment for plaintiff in an action by the payee of a note given for the purchase of chattels, wherein the defense was that the sale was procured by false representations, was not a bar to an action by the maker of the note for breach of warranty on the sale.

The court said:

"While the plaintiff discovered the breach of warranty, he could avail himself of his rights in either of the three ways: He might rescind the contract, return the property, and recover back his money (Bryant *v.* Isburg, 13 Gray, 607); he might set up the breach of warranty as a defense in whole or in part to a claim upon the note, and have his damages allowed by way of recoupment; or he might pay the whole amount of the note, and bring a suit for his damages. It is clear that he was not obliged to set up the breach of warranty in answer to the claim on the note, and that payment of the note is not in itself a bar to an action for the breach of the warranty."

In the case of Kennedy *v.* Davisson, *supra*, the court said:

"A set-off is a distinct demand, the subject of a cross-action, not a payment. A man may plead it when sued, or not plead it, and reserve it for a separate suit. If he plead it, the judgment is conclusive upon it. He may withdraw it before trial, but if he does not, and it is disallowed, it is barred by the judgment (4 Minor, Inst., 707; 1 Bart. Law Prac., 509; 22 Am. & Eng. Ency. Law, 231; Bigelow Estop., 174)."

The issue involved in the present action for damages by reason of the destruction in large part of plaintiff's crops was not raised in the suit upon the note in the United States Circuit Court, nor was there any testimony introduced upon

such issue in that trial. The plea of failure of consideration, which was interposed in the answer first served in the United States Court suit, was withdrawn in the second answer served, which was headed "Supplemental Answer," as follows:

"Now comes the defendant, J. P. Kirven, and by leave of the court first had and obtained, files this his supplemental answer in this case, hereby withdrawing any former answer heretofore filed by him herein." (See Transcript of Record, U. S. Court, p. 4).

Therefore neither the failure of consideration nor any question touching damages to the crop of Kirven were involved or passed upon in that suit. There can be no doubt that plaintiff had a right to withdraw the plea of failure of consideration. He could even have withdrawn a counterclaim for damages.

19 Enc. Plead. & Prac., 796, Kennedy *v.* Davisson, *supra.*

W. F. Stevenson,
E. O. Woods,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 18.

VIRGINIA-CAROLINA CHEMICAL COMPANY,
PLAINTIFF IN ERROR,

vs.

J. P. KIRVEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR, FILED BY LEAVE OF COURT.

The differences between the Virginia-Carolina Chemical Company and the defendant in error J. P. Kirven, which form the basis of the suit at bar as well as the basis of certain correlated suits at law which will be referred to hereafter, grow out of advances of fertilizers to the amount of $2,298.00 for agricultural purposes made by the Chemical Company through one of its agents, McCall by name, to J. P. Kirven, on or about the 17th day of February, 1898. The fertilizers were intended to be employed in the cultivation of a certain plantation owned by Kirven and known as "The Home Place."

The fertilizers were delivered on or about March 14, 1898, and on that day and in execution of the purchase thereof Kirven made and delivered to the agent McCall his promissory note for the sum of $2,298.00, payable to the order of said McCall on the 25th day of October, A. D. 1898, at any bank in Darlington, South Carolina. This note was duly endorsed by said McCall payable to his own order, "for collection for account of Virginia-Carolina Chemical Company," and not having been paid at maturity it was, on the 28th day of October, A. D. 1898, duly protested for nonpayment (R., 125).

In connection with this note and to secure the price of the fertilizers represented thereby, together with interest thereon, Kirven gave to McCall an agricultural lien on all crops made on "The Home Place" during the year 1898, "in accordance with and subject to the provisions of the laws of the State of South Carolina" (R., 125).

STATEMENT OF THE CASE.

As the main question before this court for decision depends upon the relations under established principles of law between certain of the proceedings had in the course of the various suits growing out of the non-payment of the note in question, it will perhaps conduce to clearness of understanding to state the salient points of such proceedings chronologically, in the order of the dates of their occurrences.

November 15, 1898, the Chemical Company filed summons and complaint against Kirven in Common Pleas Court of Darlington County, South Carolina. This proceeding having been discontinued without prejudice by order of the court November 30, 1898 (R., 124), it is not of consequence herein.

December 23, 1898, the Chemical Company, averring that Kirven had disposed of large parts of the crops subject to

the above-mentioned agricultural lien and was about to dispose of all of such crops in order to defeat said lien, sued out a warrant of attachment in the courts of Darlington County, South Carolina, commanding the sheriff to seize the crop of said J. P. Kirven covered by said lien and after notice, to sell the same for cash, the proceeds to be applied in the extinguishment of the amount due under the lien (R., 127).

It does not appear from the record before this court that any seizure under this warrant of attachment was made.

December 1, 1898, the Chemical Company instituted proceedings against Kirven in the Superior Court of New Hanover County, North Carolina (R., 156), and the defendant having been forthwith returned *non est*, the plaintiff caused a warrant of attachment to be issued against "all the property of the said defendant, J. P. Kirven, in said county" (R., 159).

In due season the sheriff of New Hanover County, North Carolina, made return that he had garnisheed the funds or proceeds of certain cotton in the hands of Alexander Sprunt and Sons belonging to the defendant Kirven (R., 159).

The cotton or its proceeds so garnisheed in the possession of Alexander Sprunt and Sons was claimed by E. E. Kirven, a brother of J. P. Kirven, as and for his own property. The questions as to whether J. P. Kirven was in truth indebted to the plaintiff Chemical Company in said sum of $2,298 and 85 cents costs of protest, and as to whether the cotton or proceeds thereof in the hands of Alexander Sprunt and Sons or any part thereof levied upon in the attachment proceedings was the property of J. P. Kirven, were in due course submitted to a jury, which found that said J. P. Kirven was indebted to the Chemical Company in the sum of $2,298.85, being the amount of the above-mentioned note with costs of protest, together with interest on the former from October 28, 1898, at 7 per cent, and fur-

ther, that of the total amount attached the proceeds of seventy bales of cotton, amounting to $1,725.40, with interest from December 3, 1898, was the property of said J. P. Kirven. Thereupon, on the 6th day of April, 1903, judgment of said Superior Court of New Hanover County, North Carolina, was entered upon said verdict in favor of the Chemical Company and against the defendant J. P. Kirven for said sum of $2,298.85, with interest from the 28th day of October, 1898, at 7 per cent per annum, and judgment of condemnation was entered in favor of said plaintiff Chemical Company against the garnishee, Alexander Sprunt and Sons, in the sum of $1,723.40, "being the value of seventy bales of cotton attached in the hands of said Alexander Sprunt and Sons and found to be the property of the defendant, J. P. Kirven," together with interest thereon from the 3d day of December, 1898, and costs of suit (R., 161-163).

June 17, 1904, there was paid to the attorneys for the Chemical Company the sum of $2,294.99, on account of principal, interest, and the costs of said suit (R., 163).

Apparently, J. P. Kirven did not enter appearance as a party defendant in these proceedings, though he was sworn as a witness and testified in the course of the proceedings (R., 14-15).

April 11, 1903, no payment on account of the note having then been received by it, the Chemical Company instituted proceedings in the Circuit Court of the United States for the District of South Carolina to recover on said McCall note, demanding the full amount thereof, $2,298, with interest from the 25th day of October, A. D. 1898, and costs of suit (R., 89).

May 30, 1903 (R., 168), Kirven answered the complaint filed therein, averring, among other things, by way of defense, the following:

"7. That the note sued upon in this action was given by the defendant to S. M. McCall for fertilizers, for which he (defendant) agreed to pay a sound price, which is set forth in the note sued upon, and were purchased for the use of the defendant himself and his tenants and customers *in making a crop for the year in which the said note was given,* but the said fertilizers were so unskillfully manipulated and manufactured and prepared, and were of such inferior quality, that instead of being a benefit to the crops of defendant and his tenants and customers, to whom he furnished the same, they were deleterious and destructive to the crops, and destroyed the same in large part, and there was an entire failure of consideration to the defendant for said note" (R., 167-168).

April 12, 1904, the attorneys for defendant Kirven gave notice in these proceedings that upon an affidavit, copy of which was annexed to the notice, they would on a day certain move in the United States Circuit Court for the District of South Carolina for an order "allowing the defendant to amend his answer herein in order to set up the facts contained in said affidavit."

The affidavit referred specifically to the suit by the Chemical Company against the defendant, J. P. Kirven, then pending in the Superior Court of New Hanover County, North Carolina. It set forth with particularity the seizure, under attachment, of certain bales of cotton claimed by E. E. Kirven; the verdict of the jury and adjudication of the Court that seventy bales of said cotton "belonged to J. P. Kirven, defendant herein, and was applicable to the claim of the Virginia-Carolina Chemical Company;" that "notice of appeal (by E. E. Kirven?) from said judgment was given in said action, which notice was pending at the time the answer herein was prepared;" that said notice of appeal had been withdrawn, a fact which had just come to the knowledge of deponent and his associates, and "that $1,700 has either been applied or is in the Court of Wilmington, North

Carolina, applicable to the debt, which is claimed to be represented by the note sued on herein;" that defendant deems it essential to amend his original answer "by setting up these facts," further stating that the failure to set them up in the original answer was due to no fault on the part of deponent or his associates, but solely for the reasons above stated," viz. that deponent and his associates had "just been informed that said notice of appeal from the judgment above mentioned has (had) been withdrawn or abandoned" (R., 152-153).

April 12, 1904, an order based on said notice and affidavit was passed by the Honorable William H. Brawley, United States District Judge for South Carolina, whereby defendant was allowed twenty days in which "to file such additional or supplemental answer or counter claim in the case as he may be advised is proper," reserving to the Chemical Company the right to reply thereto and also the right "to contend that the matters set up by the defendant in pursuance of this order were matters which should have been set up only by way of supplemental answer and with no greater force than if so set up (R., 154).

Upon the authority assumed to have been conferred by this order, the defendant Kirven on March 6, 1905, filed "this, his supplemental answer in this case, hereby withdrawing any former answer heretofore filed by him herein."

The Chemical Company does not appear to have interposed any objection to the withdrawal of the original answer thus made and in the subsequent course of the trial treated the defense above set forth and contained in paragraph 7 of said original answer as no longer in the case,—a position which the learned trial judge approved (R., 117, bottom, 118).

This so-called supplemental answer denied the various averments of the complaint; asserted that any note that he, defendant, might have given to McCall was given in payment of fertilizers which were the property of McCall; de-

nied the right of the plaintiff Chemical Company, as assignee of McCall, to maintain suit against him, defendant thereon, and set up by way of counterclaim against said Chemical Company the fact of the seizure and condemnation in the State of North Carolina of the proceeds of seventy bales of cotton, the same being of the alleged value of $2,450, and claimed judgment against the Chemical Company for said sum with interest and costs of suit (R., 91-93).

At the close of all the testimony given in that case the defendant, J. P. Kirven, moved the court to direct a verdict in his favor for reasons given and set forth at large in the record (R., 130-131).

This motion was overruled (R., 131).

The trial judge thereupon submitted the issues in the cause to the jury, charging them with respect to the counterclaim set up by the defendant Kirven in the sum of $2,450, the alleged value of the cotton seized under attachment in the North Carolina suit, that, if they found the facts set up in the counterclaim to be true and that the value of the cotton so seized was as therein set forth "then the defendant is entitled to judgment against the plaintiff in the sum claimed or in whatever sum the jury may find to be a fair value of the said cotton" (R., 134), further charging them that, if they found from the testimony that the Chemical Company had "attached the proceeds of the sale of cotton in Wilmington in the hands of Sprunt & Co., and not the cotton itself, then it would follow that the credit to be allowed would be the amount received in those attachment proceedings and not the value of the cotton" (R., 135).

The jury returned a verdict in favor of the plaintiff Chemical Company and against J. P. Kirven, in the sum of $911.07 (R., 139), that being the amount sued for with interest less the amount and interest condemned in, and paid as the result of the North Carolina suit.

April 4, 1905, judgment was duly entered up in conformity with said verdict (R., 96), and on writ of error from

the United States Circuit Court of Appeals for the Fourth Circuit was affirmed with costs and execution awarded thereon (R., 165).

Whether this judgment has been satisfied does not appear, although a certified copy thereof was filed on the 11th day of October, 1906, in the office of the clerk of the Court of Common Pleas for Darlington County (R., 4).

February 4, 1904, while the next preceding case was still pending and undisposed of in the United States Circuit Court for the District of South Carolina, J. P. Kirven commenced an action in the Court of Common Pleas for Darlington County, South Carolina, against the Chemical Company, and it is the judgment of the Supreme Court of South Carolina passed in this action which is before this court for review.

In his complaint Kirven set up the purchase of fertilizers from McCall, who "induced the defendant to furnish the said fertilizers," and accepted plaintiff's obligation to pay for same, and subsequently transferred said obligation to said defendant; that "defendant knew at the time of the shipment to this plaintiff of said fertilizers, that they were to be used by the plaintiff in making his crops of cotton and corn, and it assumed at the direction of the said McCall to furnish fertilizers properly manufactured and of proper fertilizing qualities for the plaintiff's use" (R., 1), but—

> "That the said fertilizers, to wit, acid, phosphate, and dissolved bone, had been manufactured with such gross negligence and want of skill that, *instead of being of advantage to the crops to which they were applied*, they destroyed the same in large part and *were not only worthless to the plaintiff, but*, by destroying his crops damaged him very heavily, and by the injury which was inflicted on his crop of cotton and corn by fertilizers which were manufactured and sold for use upon them, he was damaged in the sum of $1,995."

The Chemical Company admitting the avermenf paragraphs one and two of the complaint, and also nitting that it was the holder and beneficial owner of thobligation by way of note" referred to therein denied : entire contents of paragraph three next above set forth . 2).

Subsequently, on an affidavit duly filed, in theonth of October, 1905, the defendant Chemical Company wgranted leave to file a supplemental answer in the case wh it did. This supplemental answer set forth that sincee filing of the complaint and answer herein, to wit: "On thth day of April, 1905, a final judgment on the merits as duly entered up in the Circuit Court of the United Statfor the District of South Carolina," between the parties tne present cause, that in both cases the parties and thesues involved and raised, or which could have been rail under the scope of the pleadings are the same (R., 3).

> "That said judgment in the Circuit Cou of the United States for the District of South Carina is a final and conclusive adjudication between t parties upon the issues sought to be raised in thpresent action" (R., 4).

In the course of the trial attorneys for the hemical Company introduced in evidence a duly certified anscript of the record from the United States Circuit Court r South Carolina, above referred to, copy of which is seforth at pages 89-164, inclusive, of the printed transcript f record before this court.

At the close of the evidence attorneys for the defendant Chemical Company moved the trial court to direct verdict for the defendant "on the ground of *res adjudicata*" which motion was overruled and the learned trial judge tereupon charged the jury, among other things, as follows:

> * * * "the defendant interposes anther defense, by which he undertakes to say, and oes say, that everything that is litigated in this aion has

already been determined by an action in another court which had jurisdiction of the subject-matter and of the parties, and that the determination of that court is conclusive here, and is a bar to the plaintiff's prosecuting this action. Now, those are the issues set up here. The plaintiff claims damages because he alleges his crop was destroyed in large part by the use of fertilizers negligently and unskillfully manufactured by the defendants, whereas, the defendant has undertaken to furnish fertilizers that were skillfully and carefully manufactured for the purposes for which they were purchased; and the denial by the defendant of all that, and the special defense that this matter had already been adjudged in another court and that the parties are not at liberty to litigate it in this court (R., 80). * * * As the defendant has well said, and as I propose to charge you, the statute law of this State, which you have heard—the Code of Procedure—in one of its sections provides that 'the answer of the defendant must contain: First. A general and specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Second. A statement of any new matter constituting a defense or counter-claim in ordinary and concise language without repetition.' That is a section of the Code of Procedure.

"The meaning of this provision is that if the defendant seeks to avail himself of any such matters as these, that is, of the denial of a fact, he must deny it in his answer; or, if he seeks in any particular action to avail himself of a special affirmative defense, he must set it up, or if he seeks in that action to avail himself of some claim he has against the plaintiff, he must set it up; he cannot have the benefit of any counter-claim on his part against the plaintiff in that action, so as to have it determined or given effect to by the court unless he sets it up and brings it in the action by setting it up in his answer. But that does not mean, and cannot have, and does not have the effect of shutting him off if he fails to set up a counter-claim in his answer in a particular action,

shutting him off from ever asserting that claim against the other party. If he does set it up and it is adjudged against him, that shuts him off, but if he elects not to bring it in the case, but leaves it aside to be prosecuted by him hereafter in some other suit or adjustment between the parties, or simply allowed it to go unadjusted, if he elects to do that, he has a right to do it; and so the court held today, and holds now, that the claim here for damages by the plaintiff against the Virginia-Carolina Chemical Company was not necessarily involved; it was, as a matter of fact, not set up in his answer in that suit in the Federal court, and it was not imperative on him to set it up and it was not necessarily involved, and the fact that there has been a suit in the Federal court, judgment in that court can have no effect whatever on your determination of the issue presented here now. So that the court refuses to charge you that the plaintiff here is estopped from suing this action by the judgment of the Federal court in the other action, and that request of the defendant is refused" (R., 81).

To the refusal to charge for the defendant and to so much of the charge as above set forth which declined to give to the judgment of the United States Circuit Court in question the full effect as *res adjudicata* claimed for it the defendant noted timely exceptions (R., 84).

The jury in this cause thereupon returned its verdict in favor of Kirven and against the Chemical Company for the sum of $1,995, and motion for a new trial having been overruled, "judgment was duly entered upon said verdict" (R., 84).

On appeal to the Supreme Court of the State of South Carolina this judgment was affirmed (R., 172).

To review this judgment of the Supreme Court of South Carolina the case has been brought into this honorable court by writ of error.

ASSIGNMENT OF ERROR.

But a single assignment of error is urged upon the notice of this honorable court. It involves but a single question of Federal law, and that is Was full force and effect accorded by the trial court to the judgment of the United States Circuit Court for the District of South Carolina?

JURISDICTION OF THIS COURT.

There can be no real question as to the jurisdiction of this Court to review the judgment of the Supreme Court of South Carolina here complained of.

Whether a Federal judgment has been given due force and effect in the State court is always a Federal question, which, when sufficiently raised, as it undoubtedly was in the case at bar, is reviewable by this Court, which will determine for itself whether such judgment has been given due weight or otherwise.

Crescent City, &c., Co. *vs.* Butchers' Union, &c., Co., 120 U. S., 141.

Pittsburgh, &c., Co. *vs.* Long Island, &c., Co., 172 U. S., 493.

Deposit Bank, &c., *vs.* City of Frankfort, 191 U. S., 499-515.

MERITS.

The parties to the case in the United States Circuit Court for South Carolina and in the case at bar are the same—their positions as plaintiff or defendant in the causes alone differ.

A transaction constituting a purchase and sale of agricultural fertilizers underlies both cases.

In the Federal court the Chemical Company sought to recover against or from Kirven the balance due on his overdue and unpaid promissory note, given in payment for said

fertilizers. In the State court, that is in the case at bar, Kirven alleging that the fertilizers furnished to him and in payment for which the promissory note above referred to was given, were not only worthless to him, but in addition thereto, by reason of the negligence and want of skill with which they had been manufactured, instead of being of advantage to the crops to which they had been applied, had destroyed such crops in large part and thereby had damaged plaintiff heavily.

The solution of the question at issue turns upon whether the averment of worthlessness respecting the fertilizers as made in the case at bar did not constitute a possible defense which either might or ought to have been urged by Kirven in the suit by the Chemical Company on the promissory note in the Federal court.

If, under the law of South Carolina, as it either was or ought to have been administered in the suit in the Federal court, the alleged worthlessness of the fertilizers could have been availed of by Kirven as defendant there, on the ground that such worthlessness constituted a total failure of any consideration for which the note sued on was given, the fact that he elected not to set up such defense, or having set it up as he did, the fact that he thereafter elected to withdraw and not rely upon it, cannot in the case at bar prevent the judgment of the Federal court on said note against Kirven from operating as a bar to any action which Kirven either has brought or may bring in any other court wherein the alleged right of recovery depends upon any alleged inferiority in the fertilizers.

As said in Deposit Bank, &c., *vs.* Frankfort, 191 U. S., 499, 510, "The doctrine of estoppel by judgment is founded upon the proposition that *all* controversies and contentions involved are set at rest by a judgment or decree lawfully rendered, which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the (another)

court might inquire into and revise the reasons which led the court to make the judgment." Even where such a judgment may have been subsequently reversed, nevertheless, as was said by this court in Crescent City, &c., Co. *vs.* Butchers' Union, &c., Co., 120 U. S., 141,

> "Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law, to its full extent" * * *
>
> "It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial. * * * It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based. Cooley Const. Lim., 7th ed., 83, and cases cited."
>
> Deposit Bank &c., *vs.* Frankfort, *supra*, p. 512.

In Gunter *vs.* Atlantic Coast Line R. Co., 200 U. S., 273, wherein was discussed with great lucidity and learning the principles of estoppel by judgment, this court, speaking through Mr. Justice White, and replying to a suggestion of counsel to the effect that upon the pleadings in the case wherein the decree pleaded as *res adjudicata* had been rendered, a material fact had been erroneously assumed in a certain aspect when in truth it was otherwise, this court, speaking through Mr. Justice White, said (p. 291):

> "From this the contention is that if the truth had been established, a different decree would have

> been rendered, because no consideration for the grant of exemption would have appeared. But, even granting the premise, the deduction is unsound. To admit it would destroy the effect of the thing adjudged * * * *since all defenses then existing to the asserted right of exemption, whether brought to the attention of the court or waived, were foreclosed by the decree.*"

To the same effect are United States *v.* California and Oregon Land Co., 192 U. S., 355, and Fayerweather *v.* Ritch, 195 U. S., 276, 300, cited in connection with the quotation next above.

In Merchants Heat & Light Co. *v.* Clow & Sons (204 U. S., 286) the plaintiff in error, defendant in the Circuit Court, though denying the validity of the service of process made upon it in plaintiff's suit, nevertheless appeared, and after pleading the general issue also pleaded a recoupment or set-off of damages under the same contract upon which the original suit was based.

Without passing upon the question as to the validity of the service upon defendant, it was decided by this court, speaking through Mr. Justice Holmes, that

> "by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper. But, even at common law, since the doctrine has been developed, a demand in recoupment is recognized as a cross-demand, as distinguished from a defense."

And it was said that

> "the authorities agree that he is not concluded by the judgment if he does not plead his cross-demand, and that whether he shall do so or not is left wholly to his choice."

That the common-law rule thus stated is subject to alteration and *a fortiori* to extinction by appropriate statutory enactment is fully recognized in the succeeding paragraph of that opinion, wherein the plight of the plaintiff in error, when judged by the announced rule of the common law, was made more distressful by a reference to the applicable statute of Illinois concerning counterclaims asserted in such circumstances.

It appears to be well settled that the right of set-off or counterclaim, except as it is enforced in equity is a matter of local legislation and that the Federal courts sitting in the various States, when dealing with the subject will follow the rules established by the legislature or tribunals of the State in question.

Dushane *vs.* Benedict, 120 U. S., 630.
Charnley *vs.* Sibley, 20 C. C. A., 157; 73 Fed. Rep., 980, 982.

With respect to sales of personal property the unquestioned rule of law in the State of South Carolina is that the seller, without any express warranty or representation as to value, is held to warrant the article sold to be of value for the purpose to which it is ordinarily applied.

In Walker, Evans & Cogswell *vs.* Ayer, 80 South Carolina, 292, decided May 12, 1908, the appellants Walker, Evans & Cogswell sued Ayer for a balance alleged to be due to them on a written contract of lease with Ayer for certain typesetting machines. The defendant's answer alleged that at the time of making the contract defendant was operating a newspaper and printing office in the city of Florence and that the contract in question and the delivery of the machines referred to therein were made and done with reference to the conduct of such business; that said contract was entered into on the strength of certain representations as to the simplicity of operation of said machines and as to their general efficiency;

that all of said representations were false and that said machines were and are "wholly unsuited for the purpose for which it was (they were) delivered to the defendant and wholly worthless." * * *

The Supreme Court of South Carolina, speaking through Woods, A. J. (page 297), said:

> "The rule in this State is, that the seller, without any express warranty or representation of value, is held to warrant the article sold to be of value for the purpose to which it is ordinarily applied. The allegation here being that there was a complete failure of consideration of the contract by reason of the machines being absolutely worthless, the defendant, under the rule stated, on proof of his allegation, would be entitled to rescission of the contract (Martin *vs.* Railway Company, 70 S. C., 8). This would be so even in the absence of allegations of express representations of quality and value. * * * It is true, the machines were known by the defendant to be second-hand, and he had notice from this fact not to expect of them the highest efficiency, but the defendant alleged and offered evidence tending to prove that the machines would break the type in operation, and that they could be used only at such loss as to render them practically worthless. Notice that the machines were second-hand did not put the defendant on notice not to rely on the representations of the seller that the machines would not break type, and would be of value in the work for which they were to be used * * * (page 300). By exceptions to the charge, the plaintiff submits that the Circuit Judge erred in refusing to charge these requests. * * * The record shows the Circuit Judge did charge all these propositions. In giving them to the jury he modified them, however, in accordance with what we have tried to show is the settled law of this State as to the warranty implied in the sale of personal property, and as to the effect of representation as to quality and value. Authority will be found in other jurisdictions to support the plaintiff's requests without modification. But such decisions rest on the application to sales of personal

property of the rule *caveat emptor*, which has long been repudiated in this State."

In Dushane *vs.* Benedict, 120 U. S., 630, which was an action of assumpsit by a rag dealer against paper makers to recover the value of certain rags sold and delivered, the defendants, under the statutes of Pennsylvania, applicable to the case, pleaded "payment with leave, etc.," and set up in defense and by way of counterclaim that the sale was upon a warranty that the rags were clean and free from infection; that they were in fact infected with smallpox, which caused the disease to break out in defendant's mill, with consequent injuries to their workmen and to their business.

This court, speaking through Mr. Justice Gray, and referring to the general rule of law in, and the statutes of, Pennsylvania, said:

> "When a dealer contracts to sell goods, which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose." * * *
>
> "The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain, for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury (French *v.* Vining, 102 Mass., 132; Wilson *v.* Dunville, 4 L. R. Ir., 249, and 6 L. R. Ir., 210). So, if one sells an animal warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for false representation; * * * or in an action on the warranty, either in tort * * * or even in contract * * * (citing cases).

"In an action for the price of goods sold, or of work done, the defendant may set up a breach of warranty or a false representation as to the goods, * * * by way of recoupment of the sum that the plaintiff may recover * * * in this country the courts, in order to avoid circuity of action, have gone further (than in England), and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence, of the plaintiff, growing out of and relating to the transaction in question" * * *

"In a leading Massachusetts case, in which fraudulent representations as to the soundness of a horse sold were allowed to be set up in defense of an action on a promissory note given for the price, although the horse had not been returned to the seller, *Mr. Justice* Dewey, after reviewing the previous decisions in England and New York, said: 'The strong argument for the admission of such evidence in reduction of damages in cases like the present is that it will avoid circuity of action. It is always desirable to prevent a cross-action where full and complete justice can be done to the parties in a single suit; and it is upon this ground, that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle allowing evidence in defense or in reduction of damages to be introduced, rather than to compel the defendant to resort to his cross-action" (Harrington *v.* Stratton, 22 Pick., 510, 517).

"And in a later case in that State, Chief Justice Bigelow observed, that the essential elements on which the application of the principle of recoupment depended were two only: 'The first is, that the damages which the defendant seeks to set off shall have arisen from the same subject matter, or sprung out of the same contract or transaction, as that on which the plaintiff relies to maintain his action. The other is, that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off *or defence to the contract declared on* shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the

same damages as those relied on to defeat the action.' Sawyer *vs.* Wiswell, 9 Allen, 39, 42.

"In Bradley *vs.* Rea, 14 Allen, 20, in an action to recover the price of a number of pigs sold in one lot, it was held that the defendant might set up in defence that the pigs sold were warranted or fraudulently represented by the plaintiff to be sound and free from infectious or contagious diseases, and prove the existence of such a disease in some of the pigs at the time of the sale, which afterwards spread to the others, and of which they died. Mr. Justice Hoar, delivering judgment, after referring to Mullett *vs.* Mason, L. R. 1 C. P., 559, above cited, in which it was held that in an action for fraudulently misrepresenting that a cow sold was free from infectious disease, the buyer, if he placed the cow with others which thereby caught the disease and died, could recover as damages the value of all the cows, said: 'The nature of the subject matter of the warranty or deceit is such, that when animals are sold in one lot together, the warranty or representation as to the whole being single, we can have no doubt that the same principle should apply to the extent of a consequent; and that the right to recoup in damages should not be confined to the diminished value of those which are proved to have the disease at the time of the sale.' 14 Allen, 22. A similar decision was made in Rice *vs.* Wallace, 11 Indiana, 112.

"The later decisions of this court, modifying the earlier decision in Thornton *vs.* Wynn, 12 Wheat., 183, allow the same doctrine. Withers *vs.* Greene, 9 How., 213; Van Ness *vs.* Pacard, 11 How., 462; Winder *vs.* Caldwell, 14 How., 434; Lyon *vs.* Bertram, 20 How., 149, 154; Railroad Co. *vs.* Smith, 21 Wall., 255; March *vs.* McPherson, 101 U. S., 700, 712.

"In Winder *vs.* Caldwell, Mr. Justice Grier, who was equally familiar with the common law and with the Pennsylvania practice, said: 'Although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, or of the essence of misfeasance, immediately con-

nected with the cause of action, or any equitable defence arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped: not strictly by way of defalcation or set-off, but for the purpose of defeating the plaintiff's action in whole or in part, and to avoid circuity of action.' 11 How., 443.

"In Railroad Co. *vs.* Smith, which was an action against a railroad corporation by a contractor to recover the price of a drawbridge, it was held that the defendant might show that the construction of the bridge was so defective as to make it unfit for its purpose, and the draw worked so imperfectly as to hinder and delay the running of the cars over it; and might prove the number of hands required to work the bridge as it was built, and the number that would be necessary if it had been properly constructed. Mr. Justice Field, delivering judgment, said: 'All damages directly arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a separate action against the contractors, were payable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when the price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiff. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuity of action.' 23 Wall., 203.

* * *

"The distinction between the right of equitable defence or recoupment, independent of any statute, which may also exist out of a contract as of the plaintiff, immediately connected with the contract sued on, and by which the defendant can do no more than defeat the plaintiff's claim, in whole or in part; and the right of counterclaim under the statute, which can be based only on contract, and by

which the defendant may not only defeat the plaintiff's action, but recover an affirmative judgment against him; has been clearly brought out in the judgments of Chief Justice Tilghman.

"In assumpsit for services as a housekeeper, the defendant pleaded non assumpsit, and payment, with leave to give the special matter in evidence, and offered to prove that the plaintiff, while in his service, clandestinely took and sent away goods of his from the house. Chief Justice Tilghman, after observing that it was contended for the defendant 'that the evidence was proper, either by way of set-off, or, under the plea of non assumpsit, or a defence to the action,' expressed the opinion that it was not admissible by way of set-off, because it had been settled that the statute (of Pennsylvania) did not comprehend matters of a tortious nature; but that, considering the impolicy of multiplying suits, and the hardship of not permitting the defendant to avail himself of matters arising out of the very transaction on which the plaintiff founds his suit, the evidence offered was admissible under the plea of non assumpsit, to show that the plaintiff's services were ill performed, and thus to affect the amount which she could recover, and on this ground alone the judgment below, which excluded the evidence, was reversed. Buck v. Shoaff, 4 W. & S. 129.

* * *

"Again, in debt against principal and surety on a bond given for the purchase money of a mill sold by the plaintiff to the principal defendant, the defendants proved that at the time of the sale the grantor opposed the dam was at its lawful height, whereas it was in fact, as the plaintiff knew, so high as to overflow and injure the land and mill of a neighbor without his consent, and that if the grantor should lower his dam to its lawful height, the value of his mill would be greatly reduced, and then offered to show how much the value of his mill would be diminished by so lowering the dam. It was held that the evidence, though going to prove matters of distinct interest, was admissible, for reasons thus stated by Chief Justice Tilghman: 'It is very true that

these damages were not in the nature of a debt, which can be set off. But they were not offered as a set-off. It was an equitable defense, showing that the plaintiff ought not to be permitted to recover the whole purchase money; and if not, then it was necessary to show what would be a reasonable abatement. Such defenses have always been admitted in our courts. Having no court of chancery, we could not get along without them. To permit the plaintiff to recover the whole purchase money, and leave the defendants to their remedy by an action for fraudulent concealment, would be most unjust. The purchase money and damages arise out of the same transaction, and the proper time for inquiry was before the money was taken from the pocket of the defendants. It might be too late afterwards. And certainly the plaintiff has no right to complain, if the whole business is settled at once. What he is not, in good conscience, entitled to receive, he should not be permitted to receive. Light v. Stearns, 12 S. & R., 451, 453.

The result of the Pennsylvania decisions may be summed up thus: First, independently of the statute, any matter, either of contract or of tort, immediately connected with the plaintiff's cause of action, which would be set up by way of recoupment, under the law as generally understood and administered in the American courts, may be set up by way of defense to the action and in abatement of the plaintiff's claim. Second, any matter of contract may be set up by way of counter-claim, under the statute, not only to defeat the plaintiff's action, in whole or in part, but also, if the defendant proves that the plaintiff owes him more than he owes the plaintiff, a judgment for the balance. Third, any matter of tort may be pleaded by way of recoupment against the plaintiff's claim, for the purpose of reducing the damages, but not for the purpose of obtaining a judgment for the defendant. Fourth, any matter of tort may be pleaded as a counter-claim, under the statute.

The court having found that there had been a breach of the implied warranty of soundness, committed on behalf of the plaintiff, it was concluded that the defendant was entitled to judgment

of the lower court should be reversed and the cause remanded with directions to set aside the verdict and to order a new trial, and in summing up the entire matter, which had been discussed in such detail in the course of the very elaborate opinion above quoted from at such length this court was pleased to conclude as follows:

> "For the guidance of the parties and their counsel, it may be well to restate exactly what will be open to the defendants upon another trial.
>
> "By way of recoupment or equitable defense, which is limited to defeating the plaintiff's action, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods were worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequence of the breach of warranty, or the fraudulent representation.
>
> "But under their counter-claim, seeking, as permitted by the statute of Pennsylvania, not only to defeat the plaintiff's action, but also to recover an affirmative judgment against him, they can avail themselves only of a claim sounding in contract, in the nature of an action of assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only, whether in the nature of an action of deceit, or of such an action as these defendants might maintain against a person, with whom they never had any contract, who wilfully or negligently introduced the smallpox into their mill."

What this court decided to be permissible under the doctrine of set-off, counter-claim, or recoupment by the common law and to have been expressly permitted, though in somewhat restricted form, by the laws of Illinois and Pennsyl-

vania above indicated has been more positively and the more broadly provided for by the Code of Procedure of the State of South Carolina, whose provisions, as set forth in sections 170 and 171 thereof, must be assumed by virtue of the provisions of section 914 of the Revised Statutes of the United States, declaring that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than in equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding," to have been considered by and to have governed the discretion and course of action of the learned Federal district judge in the trial of the case in the United States Circuit Court for the District of South Carolina, the judgment rendered wherein is to have controlled operates as a bar to any recovery by Kirven for the damages alleged to have been sustained by him by reason of the inferior or deleterious quality of the fertilizers furnished to him by the Chemical Company.

The provisions of the Code of Procedure of South Carolina above referred to are as follows:

"Section 170. The answer of the defendant must contain:

"1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

"Section 171. The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

"1. A cause of action arising out of the contract
or transaction set forth in the complaint as the foun-
dation of the plaintiff's claim, or connected with the
subject of the action.

"2. In an action arising on contract, any other
cause of action arising also on contract and existing
at the commencement of the action."

At the date of the trial of the case at bar and of the
charge of the learned trial judge, above set-
ting to construe the above provisions of the Code, which con-
struction affords the foundation or basis for the question
now being discussed, the Supreme Court of the State of
South Carolina had seemingly never been called upon to
define, construe, or apply the provisions of said section to
any such aspect as was presented in the case at bar.

The matter having come before the Supreme Court of
South Carolina on writ of error to review the judgment of
the trial court at bar, said supreme court being composed of
four justices, said justices divided in opinion, thus affirming
the judgment of the trial court without opinion, thereby leav-
ing the litigants before it any real light as to the true
purport of the law in such regard under which the parties and
by which the particular transaction had been adjudged.

It will be noted that Mr. Justice Gary, apparently of
opinion that the cause of action set forth the complaint
at bar, though between the same parties, upon a distinct
and different claim or demand and that in the trial of
the Circuit Court of the United States question as to
whether the assignee of the note had a to maintain
the action was precluded under a statute United States,
he was of opinion that the ruling cases by this court
in Council vs. County of Sac, 91 U. S., most logically
result in the conclusion that plaintiff not stopped to
the instant action by the judgment below rendered
against him in the Circuit Court of the United States, be-

cause, as the present claim was for unliquidated damages arising from the destruction of his crops, owing to the deleterious character of the fertilizers furnished, while in the former case the action had been upon the promissory note given in payment for said fertilizers, the questions here presented was not "actually" litigated and determined in the former action, and he lays some emphasis upon the fact that although the claim now made and based upon the deleterious character of the fertilizers had been set up by way of defence in the earlier case it was *withdrawn* therefrom by the defendant in error here and *not abandoned*.

Mr. Justice Woods concurred with Mr. Justice Gray on the question of *res adjudicata*, but he on his part, after discussing the provisions of section 170 of the local Code of Procedure, concluded that while "*it is clear that Kiernan's claim might have been set up as a counter-claim in the first suit*," it was not obligatory upon him under the provisions of section 170 of the Code to so set it up, further concluding that all that said section 170 requires—

> "is that any paper purporting to be an answer must contain either a denial of a material allegation of the [the plaintiff or (of)] new matter constituting a defense or a counter-claim, or it will be no answer. It cannot in any view be considered a legislative enactment that any separate cause of action which might have been, but was not used as a counter-claim, shall not be available in a separate action. * * *
>
> "Had Kiernan gone to trial on the plea of failure of consideration, setting nothing of his counter-claim for damages, and had lost on that issue, the judgment would have been conclusive that there was no failure of consideration, and hence absolutely no basis for a separate action for damages for injury done by the fertilizer sold. The case in that condition would have been within the exception."

"But he had his election to use the fact, if it be, of the worthlessness of the fertilizer as a defense by pleading failure of consideration; or, by separate suit, assert as a distinct cause of action the fertilizer to be positively deleterious and claim damages for the injury which resulted from its use.

"Inasmuch as he did not submit the issue of failure of consideration in the Federal court, the judgment in that court did not adjudicate that there was no defect in the goods or injury from their use. It only precluded Kirven from setting up defects as a defense ever thereafter, on the familiar rule that a defendant must set up all his defenses or lose the benefit of them. Therefore as a defense, failure of consideration was gone.

"But when Kirven elected not to use, as a defense, the fact of worthlessness which might have been available in the action of the Virginia-Carolina Chemical Company against him, he was not precluded from using the very different facts of deleteriousness and positive injury caused by appellant's alleged negligence in the manufacture of the fertilizer as the basis of an independent cause of action" (R., 173-174).

It will be noted that Mr. Justice Woods largely founded his conclusion with respect to the proper construction of the provisions of the local Code upon his understanding of the principle laid down in the case of Hart *vs.* Bates, 17 S. C., 69, which case, as will hereinafter appear, the Supreme Court of South Carolina explains falls within an exception to the general rule, and was only incidentally expository of the rule itself.

Mr. Chief Justice Pope learnedly discusses the legislative history of sections 170 and 171 of the local Code of Procedure, and the circumstances which led to their adoption, and the express alteration by their terms of the rules of practice and procedure theretofore prevailing under the law of the State.

He lays much stress upon the use of the word "must" in the requirement that "the answer of the defendant must contain * * * a statement of any new matter constituting a defense or counter-claim," and he concludes that—

> "Relief from a prior unsatisfactory condition of procedure was intended to be embodied in these provisions of the Code, which provided for the abolition of all distinction between suits in equity and actions at law and the abolition of all common-law forms and the establishment of one form to be known as the civil action. * * * Proceeding to carry out this design the framers of this legislation were met with cases in which although it might be an advantage to litigants to pursue a certain course yet there was no special advantage to be gained as a matter of public policy. Others occurred in which justice and public policy demanded certain methods of procedure. In providing for the former permissive words were used while in the latter cases the language is mandatory. Attention is called to this for the purpose of emphasizing the word *must* in the act now under consideration. The legislature having used the term, this court must take for granted that it was used advisedly and for purpose of remedying some existing evil. It has no authority to hold that the term was used inadvertently. The act also provides that the defendant may set up as many defenses or counterclaims as he has however inconsistent they are with each other. This is to give him the benefit of all his claims. Construing this clause with the whole act the strong implication is if he fail to set up any one of his defenses or counterclaims he is, after judgment, precluded from again asserting what might have been his right. This is the only construction consistent with the mandatory intimation as to what the answer shall contain." (R., 177).

"Under our statute one action makes a finality. Pomeroy in his work on Remedies, section 903, says: 'In the absence of statutory provision it is not necessary to plead counter-claims in defense. *Englefield, Seymour*, where statute does require it, all claims and

defenses MUST *be set up.* * * * It seems plain that the claim on which the action here is brought arose out of the transaction as to the fertilizer. But if this be doubted, certainly no one can doubt but that it is connected with the subject-matter of the former suit. The fertilizer sold was productive of the alleged damage here sought to be recovered for. Therefore, it should have been set up as a defense. There are no cases exactly in point, but McAlily vs. Barber, 4 S. C., 48, and Rice vs. McHaffey, 9 S. C., 482, to some extent support the position taken.

"But aside from the statutory provision there is strong ground for holding that the plaintiff here cannot now maintain his action. The general rule will not be doubted that a direct final judgment of a court of competent jurisdiction, on the same subject-matter, between the same parties, and parties in law or estate, is conclusive and cannot be re-examined in a subsequent action in the same or any other court" (R., 178).

"With this principle in view let us examine the facts of the present case. There can be no doubt that although the former action in this case was brought upon a note, it was in fact for the recovery of the value of the fertilizer here alleged to have caused the damage. Plaintiff himself in the record admits this. What issue was decided then in that former case? Plaintiff there alleged that it had sold to the defendant fertilizer to the value of a certain sum. This defendant denied. The issue went to the jury and they found for the plaintiff. Interpreting their verdict, they in effect say that plaintiff did sell the defendant fertilizers, that they were valuable to him to the amount claimed, and therefore, defendant should pay plaintiff such amount. The defendant now brings this action alleging damage arising from the deleterious quality of fertilizers. This could have been a perfect defense to the action above referred to if the subject could have proved it. He could even have claimed his damage and the jury instead of finding that the fertilizers were of value to him could have found that they did him damage and could have given him a judgment against the plain-

tiff. This case is identical in principle with the case of Blair *vs.* Bartlett, *supra*. In that case plaintiff brought an action for malpractice. Prior to this action defendant had brought an action against him in which he recovered the full amount claimed for his services. To this action he pleaded *res adjudicata*. The court sustained this plea, saying that the former case had established the facts of the rendition of the services and that they were valuable to the defendant hence he was compelled to pay for them. But if of value, they could not have been useless, and if of no use, they could not have been harmful. Identical are the facts found here. The former action settled beyond all question that plaintiff received the fertilizers and that they were of value to him. Applying the reasoning of the court above, if they were of value they could not have been useless, and if of use they could not have been harmful. Value and harm are antipodal terms. They cannot coexist in the same material. The former action having found that the fertilizers were valuable if the plaintiff is now allowed to succeed in this action he must necessarily impute error to the former finding of a court of competent jurisdiction, a thing which according to the authorities and as a matter of public policy he will not be allowed to do" (R., 178-80).

Mr. Justice Jones concurred with Mr. Chief Justice Pope in the view that upon the ground last discussed the judgment of the lower court should be reversed.

It has been said that there is no very clear distinction to be drawn between want of consideration and failure of it, for failure itself creates a want, and proof that no article for which a promissory note was given turned out to be valueless will sustain a plea either of failure of consideration or of no consideration.

Meekins *vs.* Lewis, 89 Indiana, 1.

Whether a defect in the quality of the thing sold, or its unfitness for the purpose for which it was bought, constitutes a failure of consideration, depends ordinarily upon whether there was any express or implied warranty in the sale of it.

In an action on a promissory note given for the price of goods sold with a warranty, it is always a good defense that the goods turned out to be worthless.

Shepherd vs. Temple, 3 New Hampshire, 455.

A purchaser of goods is not bound to return them in order to entitle him to damages for the breach of the warranty, but may keep them, and in an action against him for the price (note) show such inferiority in reduction of damages. Recoupment may be pleaded and enforced in an action for the price.

Street vs. Blay, 2 B. & Ad., 456.
Miller vs. Smith, 1 Mason, 437.
Butler vs. Northumberland, 50 N. H., 33.
Warren vs. Van Pelt, 4 E. D. Smith (N. Y.), 292.
Muller vs. Eno, 14 N. Y., 597.

It is conceded that questions purely of local practice are not Federal and that the construction of a State statute by a State court is binding upon this court and is not reviewable upon writ of error, but where the proper interpretation of the provisions of a State statute which has not been unconstitutionally construed by the State courts enters into or affects a right claimed under an authority of the United States or of their constitution or laws this court will construe the State statute for itself. As in the branch of the case before the Circuit Court of the United States, in the absence of an authoritative ruling by the State courts on the subject it was competent for that court to construe and apply the provisions of the State Code of Procedure above quoted, so in the matter at bar under the claim of Federal immunity

and in the continued absence of such authoritative ruling by the State courts it is still open to this court to determine for itself what was the true force and effect of said code provisions upon the course of procedure had in the trial in such circuit court.

In this view it may be conceded to be well settled that a party defendant having a cross-claim against a party plaintiff, is not, as a general rule, required to set up such claim by way of recoupment or as a counter-claim in the action brought by the plaintiff against him, but may make it the subject of a separate action. But to this general rule there is an exception, as well established as the rule itself, and within this exception it is submitted the case at bar falls. The general rule being that a party defendant may or may not, at his election, set up his claim by way of recoupment if he does not do so, in the case falling within the exception to the general rule, he fails at his peril, for in such case the judgment in the action brought by the party plaintiff will be an estoppel against the cross-action of the party defendant if subsequently sued on. The general rule is based upon the theory that the party plaintiff's cause of action and the party defendant's cross-claim or demand exist independently of each other, and may be the subject of separate suits and separate proof, and may proceed to separate judgments uninfluenced by each other. This is the theory lucidly expounded in the case of *Merchants Heat & Light Company vs Clow*, 204 U. S., 285. Where, however, the subject-matter of the party defendant's cross-claim or demand constitutes a defense to the plaintiff's action, then it must be set up or all benefit of it will be lost for the reason that the judgment on the plaintiff's demand precludes and bars forever all defenses that could have been offered against it, whether they were set up or not. The principle upon which the exception rests, to wit, that the first judgment bars or precludes all defenses of whatever kind that may have existed, is recognized by the decisions both of this court as

well as all other courts in the United States. *Cromwell vs. Sac County*, 94 U. S., 351, and cases cited in our main brief. The case at bar is an example of the exception. The subject-matter of the cross-action of defendant in error Kirven, by which he now seeks damages, constituted a defense to the action on the note by the Chemical Company. In order to establish such claim in this action, Kirven must as a prerequisite plead and prove worthlessness of the fertilizers so great as to amount to positive viciousness, and of necessity, therefore, he must be permitted by negation to wade through the fact of value in the fertilizers or the existence instead of failure of consideration which was necessarily settled by the prior judgment. This presents a concrete example of the exception, which as above stated is as firmly fixed as the general rule.

Black on Judgments, sec. 767.
23 Cyc., 1202, and cases cited.
Reichert *vs.* Krass, 41 N. E., 835 (Ind.)
Blair *vs.* Bartlett, 75 N. Y., 150.
Dunham *vs.* Bower, 76 N. Y., 76.

Black, in his work on Judgments, thus states the established general rule and the equally well established exception thereto (vol. II, sec. 767):

> "The rule constantly insisted on in the foregoing sections, that every matter of defense is concluded by the judgment which might and should have been presented in the action, sometimes comes into apparent conflict with the equally important rule that a matter of set-off or recoupment, not inconsistent with the plaintiff's claim, need not be so presented, but may be reserved as the basis of a future action. The doubt arises in cases where it is uncertain whether the same transaction gives to each party an independent cause of action, or in cases where the defendant's contention is both a defense to the plaintiff's claim and a ground for the recovery of damages. But it is believed that all such ambiguous

cases may be solved by the application of the following rule: Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judgment affirms to be true. But if, out of the same transaction or state of facts, each party may acquire a right of action,—so that the facts on which the plaintiff recovered may very well be true, and yet the facts on which the defendant seeks to recover may be equally true,—then the former judgment is not a bar to the maintenance of the present suit. For example, a judgment in favor of a carrier, in an action by him to recover freight, is a bar to an action by the owner of the goods shipped to recover damages for destruction of the property, caused by a failure on the part of the carrier to perform his contract of transportation. Where goods are so destroyed, the shipper is excused from freight, and a recovery of damages therefor would be inconsistent with the carrier's right to recover freight. On the other hand, where the defendant contracted to dig a cellar and lay a wall for the plaintiff by a certain time at a certain price, but did not complete it at the given time, whereby the plaintiff suffered damage; and after the job was finished the defendant sued the plaintiff for the balance of the contract price, and recovered judgment by default; and afterwards plaintiff brought his action for damages for breach of contract, it was held that the former recovery was no bar. In another case, a purchaser of goods, having paid for them partly in cash and partly by his note, discovered that he had paid for more than he had received, but nevertheless suffered the vendor to recover judgment against him on the note, without objecting any

> want of consideration. He then brought an action to recover back the amount overpaid, and the action was sustained; for giving the note being a payment, a cause of action accrued to him immediately, which was independent of the judgment upon the note."

The court's attention is also invited to the statement of the principle and the cases applying it, found in 23 Cys., pages 1202-03.

Kirven, the defendant in error, actually pleaded the subject-matter of his case now before this court as a defense in the action in the United States court, which resulted in a judgment for plaintiff in error for the full amount of the note. He undertook to withdraw this defense—whether by permission of the court or not would seem to make no difference. It is certain he did not withdraw it by any express permission of the court to do so. The right accorded to him by order of the court was to amend his answer in another particular than in this regard. Of his own motion he withdrew or abandoned this defense by the service of an amended answer, which omitted it. When the case was tried in the United States Circuit Court, the Chemical Company, acting upon the well-established rule of practice prevailing in the courts of South Carolina and other jurisdictions (*Goodwin vs. R. R. Company*, 76 S. C., 557-561), to the effect that a party will not be permitted to prove anything that he has not alleged either in his answer or his complaint, objected to the introduction of any proof on the subject of destruction of crops, same not being covered by the pleadings as they stood. The defendant in error, Kirven, did not see fit to ask the Circuit Court of the United States to permit him to amend his answer by reintroducing his claim in such regard, and the Circuit Court of the United States certainly could not have been expected to suggest to him to amend in a particular which he had already indicated he did not regard as of consequence.

Nor was it to be expected that the Chemical Company would, on behalf of its opponent, suggest the desirability of making such an amendment. The inability of Kirven in that case to introduce testimony as to the bad quality of the fertilizers was of his own contriving and grew out of a position voluntarily assumed by him. Having interposed the defense, and subsequently having withdrawn it, he was left in a worse position than if he had not interposed it, for he so demonstrated that knowing of its existence he had voluntarily abandoned it.

In our view the various opinions of the justices of the Supreme Court of the State of South Carolina in this case have not undertaken to establish the principle of *res adjudicata* to be different in that State from that which is above set forth. The opinions of Mr. Chief Justice Pope and Mr. Justice Jones are in entire accord without contention. The opinions of Justices Woods and Gary indicate that those learned justices have failed to recognize the exception to the general rule above quoted and fully sustained by the authorities cited in our main brief.

During the pendency of this writ of error before this court the precise question, in so far as the principle of *res adjudicata* or estoppel by judgment under the South Carolina law above cited is concerned, has again come before the Supreme Court of South Carolina, and by an unanimous court has been adjudged in accord with the foregoing contentions.

The case referred to is that of the Greenwood Drug Company *vs.* Bromonia Company, 81 South Carolina, 516, which was decided November 16, 1908.

As the opinion of the court not only establishes the law of South Carolina, in so far as estoppel by judgment in the courts of that State is concerned, but also comments upon and undertakes to distinguish the case at bar, we venture

for the convenience of the court to here reproduce the opinion in full. It is as follows:

> "This appeal involves the application of the law of estoppel by judgment.
>
> "In the former action the Bromonia Company recovered judgment against Greenwood Drug Company for the value of a quantity of certain medicine called bromonia, amounting to $140, and for expenses of advertising said medicine, amounting to $57.50, pursuant to a contract entered into between the parties, which judgment on appeal to this court was affirmed. Bromonia Company *vs.* Greenwood Drug Company, 78 S. C., 482; 59 S. E., 363. Thereafter, Greenwood Drug Company paid the judgment, and brought this action against the Bromonia Company, and attached the funds paid in settlement of said judgment. The complaint in this action seeks to recover damages for alleged fraudulent misrepresentation by the Bromonia Company, which induced Greenwood Drug Company to enter into the contract sued on in a former action, and for the worthlessness of the medicine for which recovery was had, alleging as elements of the damages the $140 paid as the price of the goods; $57.50, the amount paid for advertising; $30.36, the interest on these amounts; $71.70, the costs of that suit; and $90.94, the attorneys' fees and expenses incurred by Greenwood Drug Company in defending that suit.
>
> "Judge Gage dissolved the attachment and dismissed the complaint, holding that the plaintiff, Greenwood Drug Company, was estopped by the judgment in the former action, from which order appeal is taken by the defendant.
>
> "The reasons given by Judge Gage are as follows:
>
> "'The complaint in the second case is practically the same as the answer in the first case, except that it alleges a scienter on the part of the Bromonia Company when it made the alleged false statements. The Greenwood Company contends that the issue of fraud which it now makes has never before been made and adjudicated; that it is entitled to a day in court, and now demands it. It contends that, inas-

much as that issue was not made in the first action, it was not then adjudicated.

"The parties to the action are the same; the court is the same; the subject-matter, bromonia, and the advertisement of it, is the same. The exact issue in the first case was: Did the Greenwood Drug Company owe the Bromonia Company for a lot of medicine, and for money paid out in the advertisement of the medicine? That, too, is the issue in the second case. It was decided in the first case, and that ends the controversy. Cromwell *vs.* Sac County, 94 U. S., 352.

"'If Smith should sue Brown on a note, and Brown should plead payment, and the jury should find for Smith, Brown could not thereafter renew the controversy by pleading that Smith had seduced him into signing the note by fraudulent misrepresentation.'

"We think the judgment should be affirmed. The general rule is that a judgment giving effect to a contract is conclusive evidence that it is free from fraud or illegality, although such issue was not raised in the action, except where the party objecting was ignorant of the fraud or illegality before judgment, or was prevented from pleading it. 23 Cyc., 1294. The case of Hart *vs.* Bates falls within the exception stated, as, in that case, the fraud was not discovered until after the former judgment. Estoppel by judgment on the merits covers not only what was actually decided, but also what was necessarily implied in the final result. 23 Cyc., 1306. Our decisions are in accord with this general rule. In Willis *vs.* Tozier, 44 S. C., 1, 17, the court said: 'A judgment is conclusive between the parties to it, not only as to those matters which were actually decided, but also all such as were necessarily involved in its rendition. Trimmier *vs.* Thompson, 19 S. C., 254; Micheau ads. Caldwell, 1 Spear, 276.' Hence, a judgment on a note is conclusive that the maker's name was not forged. Fraser & Dill *vs.* Charleston, 19 S. C., 384. And allegations of fraud in the execution of a mortgage and prior payments are *res judicata* after judgment of foreclosure and sale, and

will not support an action to set aside the sale and vacate the mortgage where the defendant appeared in the former action and had opportunity to litigate such question. Ruff *vs.* Doty, 26 S. C., 173; 1 S. E., 707. In this last-mentioned case the court, referring to Hart *vs.* Bates, 17 S. C., 35, and Fraser & Dill *vs.* Charleston, 19 S. C., 399, said: 'These two cases, considered together, decide briefly that a matter not necessarily involved, and not raised in a previous case, is not *res judicata;* but if necessarily involved, and (whether) raised or not, it is concluded, and especially so if the party denying the adjudication knew of the matter and could have interposed it at a previous trial, either in support of a claim or as a defense.' In Ryan *vs.* Association, 50 S. C., 188, 27 S. E., 618, the court held a judgment debtor estopped from bringing a separate action under section 1891, for usurious interest collected of him in a foreclosure judgment, as the judgment negatived usury.

"In this case the Greenwood Drug Company knew of the alleged fraud, if any existed, as the answer in the former action set up the said fraud but failed to allege the scienter; and in the second action the complaint alleged that 'Soon after entering into said contract the plaintiff had reason to believe that it had been deceived and defrauded, etc.' Hence, this case cannot fall within the exception to the general rule. The plaintiff was not prevented from pleading fraud in the former action, but because of its defective plea certain evidence which it sought to introduce on that subject was properly rejected. Such result followed from the failure or neglect of the Greenwood Drug Company to make proper plea, and not from any denial of the right to make such issue. The judgment upon the contract necessarily involved an adjudication that the Bromonia Company had delivered to Greenwood Drug Company goods of value as alleged, and had incurred expense of advertising, according to contract, and necessarily implied that there was no want or failure or illegality of consideration in the contract enforced. To support the second action would necessarily assail and

annul the correctness of the result in first action and give back to Greenwood Drug Company the money it was adjudged to pay therein, on the ground that the goods adjudged to be of value were really worthless, and on the ground that the contract adjudged to be a valid obligation was void for fraud, known at the time of the former judgment. It is apparent that the second action substantially involves the issues actually and impliedly involved in the first action, and it is of no consequence that the form of the second action was in tort, while the first action was in contract.

"The appellant cites Kirven *vs.* Chemical Co., 77 S. C., 494; 58 S. E., 524, as sustaining its contention. In that case the judgment of the Circuit Court was affirmed by a divided court in effect holding that a judgment of the United States Circuit Court on a note for fertilizers is not *res adjudicata* of an action in the State court for damages for actual injuries to the crop of the defendant, caused by the use of the fertilizer, alleged to have been negligently compounded in the United States Court by permission of the court.

"If it is to be conceded that the action by Kirven in the State court was a distinct and independent suit for actual injury to his property, constituting a cross action as distinguished from a suit based upon mere failure of consideration of the notes upon which judgment was rendered, there is much reason for holding that a withdrawal of such issue by permission of the court in the first suit should prevent judgment therein from operating as an estoppel in a subsequent suit on the issue or cross claim so withdrawn. The opinion of the two justices opposed to affirmance in that case was based upon the view that where a judgment goes against the defendant, and he afterwards sues plaintiff on a cross claim which he might have presented in the first suit, but did not, *if the facts which he must establish to authorize his recovery are inconsistent with or opposed to the facts on which recovery was had in the first action*, the former judgment operates as an estoppel. If Kirven in the second action had sued for damages arising from his

payment of the judgment rendered against him, on the ground that the fertilizers were worthless, and that fact was known to him before the judgment, he would undoubtedly have been estopped by the judgment.

"But in the case at bar no issue was withdrawn by permission of the Court; and if evidence of fraud was excluded it was only because such fraud was not properly pleaded. The case stands as if there had been no attempt to plead fraud in avoidance of the contract. Moreover, the present suit is not upon a distinct and independent cause of action for actual injury, arising from the sale or use of the medicine, but is nothing more in effect than an action to restore Greenwood Drug Company to the status it would have occupied if it had made successful defense in the former action; in other words, to reopen and relitigate that case.

"These views require that the order of Judge Gage be sustained.

"It appears that on the 13th day of January, 1908, Judge Klugh issued an order enjoining the Bromonia Company from enforcing its said judgment against the property of Greenwood Drug Company during the pendency of this action; and from this order the Bromonia Company has appealed. For the reasons already stated the order of Judge Klugh should not have been granted.

"The judgment of this Court is that the order of Judge Gage herein be affirmed and the order of Judge Klugh herein be set aside."

The Supreme Court of South Carolina here expressly declares that an "estoppel by judgment on the merits covers not only what was actually decided, but also what was necessarily implied in the final result," and that the prior decisions of that court "are in accord with this general rule," and further that all matters "necessarily involved, and whether raised or not" are concluded by the judgment, "especially so if the party denying the adjudication knew of the matter and could have interposed it at a previous trial, either in support of a claim or as a defense."

As the Greenwood Drug Company knew of the alleged fraud and worthlessness of the drugs, if any existed, at the time of the first trial, but was prevented from showing same because of its defective pleading, it was held that—

> "The judgment upon the contract necessarily involved an adjudication that the Bromonia Company had delivered to Greenwood Drug Company goods of value as alleged, and had incurred expense of advertising, according to contract, and necessarily implied that there was no want or failure or illegality of consideration in the contract enforced. To support the second action would necessarily assail and annul the correctness of the result in first action and give back to Greenwood Drug Company the money it was adjudged to pay therein, on the ground that the goods adjudged to be of value were really worthless, and on the ground that the contract adjudged to be a valid obligation was void for fraud, known at the time of the former judgment. It is apparent that the second action substantially involves the issues actually and impliedly involved in the first action, and it is of no consequence that the form of the second action was in tort, while the first action was in contract."

It is difficult to perceive any real difference in principle between the two cases. In the Drug Company case the plaintiff was held to be estopped by the prior judgment, notwithstanding he had been prevented by reason of his defective pleading from showing failure or want of consideration under the contract, owing to the alleged worthlessness of the medicines furnished and the consequent damage suffered by him. In the case at bar it is respectfully submitted that Kirven should have been held estopped by the prior judgment of the Federal circuit court, notwithstanding his inability to show the failure or want of consideration for his promissory note, owing to the alleged worthlessness of the fertilizers and the consequent damage to his crops, because of the state of his pleadings in the prior cause.

The withdrawal of this plea in such regard left him, under

the law, in no better or different position than if he had never pleaded the matter by way of defense at all, or, had gone to trial upon an imperfect or inartificial pleading thereof.

Upon the whole case it is respectfully submitted that the judgment of the Supreme Court of South Carolina should be reversed and the cause remanded for further proceedings in conformity with law.

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